# Cross-border transfers of undertakings

Henckel, Kirsten Corine

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**Kirsten Corine Henckel**

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Ulrik Huber Institue for Private International Law
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by

**Kirsten Corine Henckel**

born on 23 August 1987
in Delfzijl

**Supervisor**
Prof. mr. dr. M.H. ten Wolde

**Co-supervisor**
Mr. dr. J.G. Knot

**Assessment Committee**
Prof. dr. A.L.B. Colombi Ciacchi
Prof. dr. J. Erauw
Prof. mr. dr. S.S.M. Peters

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The research was concluded on 1 October 2016.

Ees, 23 November 2016

Kirsten Henckel

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# Table of Abbreviations

| | |
|---|---|
| AA | Ars Aequi |
| AIM | Advanced Institute of Management |
| AR Updates | Arbeidsrecht Updates |
| ArA | Arbeidsrechtelijke Annotaties |
| ArbG | Arbeitsgericht |
| ArbRAktuell | Arbeitsrecht Aktuell |
| AuR | Arbeit und Recht |
| BAG | Bundesarbeitsgericht |
| BerGesVR | Berichte der Deutschen Gesellschaft für Völkerrecht |
| BGB | Bürgerliches Gesetzbuch |
| BVerfG | Bundesverfassungsgericht |
| BW | Burgerlijk Wetboek |
| Cass. | Hof van Cassatie (Belgium) |
| CC | Code Civil |
| cf. | confer |
| Ch.Soc. | Chambre Sociale |
| CMLR | Common Market Law Review |
| CT | Cour du Travail (Belgium) |
| DB | Der Betrieb |
| Dr. Soc. | Droit Social |
| EC | European Community |
| EELC | European Employment Law Cases |
| EIRA | Employment and Industrial Relations Act (Malta) |
| ELR | European Law Review |
| et al. | et alii |
| et seq. | et sequens |
| ETUI | European Trade Union Institute |
| EU | European Union |
| EU | European Union |
| EuZA | Europäische Zeitschrift für Arbeitsrecht |
| FIP | Financiering, Zekerheden en Insolventierechtpraktijk |
| GWR | Gesellschafts- und Wirtschaftsrecht |
| HR | Hoge Raad der Nederlanden |
| i.e. | id est |

| | |
|---|---|
| ICLQ | International & Comparative Law Quarterly |
| ILO | International Labour Organisation |
| Ind Law J | Industrial Law Journal |
| IPRax | Praxis des Internationalen Privat- und Verfahrensrechts |
| JAR | Jurisprudentie Arbeidsrecht |
| Ktr. | kantonrechter |
| LAG | Landesarbeitsgericht |
| MvT | memorie van toelichting |
| NILR | Netherlands International Law Review |
| NIPR | Nederlands Internationaal Privaatrecht |
| NJB | Nederlands Juristenblad |
| NJW | Neue Juristische Wochenschrift |
| no. | number |
| NZA | Neue Zeitschrift für Arbeitsrecht |
| O&F | Onderneming en Financiering |
| ObA | Oberster Gerichtshof für Arbeitsrechtssachen |
| OECD | Organisation for Economic Cooperation and Development |
| OGH | Oberster Gerichtshof |
| OJ | Official Journal (of the European Union or the European Communities) |
| p. | page(s) |
| RabelsZ | Rabels Zeitschrift für ausländisches und internationales Privatrecht |
| Rb. | rechtbank |
| RdA | Recht der Arbeit |
| RDIP | Revue critique du droit international privé |
| RIW | Recht der internationalen Wirtschaft |
| SAE | Sammlung Arbeitsrechtlicher Entscheidungen |
| SE | Societas Europaea |
| SEW | Tijdschrift voor Europees en economisch recht |
| SR | Social Recht |
| TAP | Tijdschrift Arbeidsrechtpraktijk |
| TFEU | Treaty on the Functioning of the European Union |
| TPR | Tijdschrift voor Privaatrecht |
| TRA | Tijdschrift Recht en Arbeid |
| Vrz. | Voorzieningenrechter |
| WPNR | Weekblad voor Privaatrecht, Notariaat en Registratie |

| | |
|---|---|
| Yale L J | Yale Law Journal |
| ZAS | Zeitschrift für Arbeits- und Sozialrecht |
| ZAS | Zeitschrift für Arbeits- und Sozialrecht |
| ZESAR | Zeitschrift für europäisches Sozial- und Arbeitsrecht |
| ZfA | Zeitschrift für Arbeitsrecht |
| ZIP | Zeitschrift für Wirtschaftsrecht |
| ZVGlRWiss | Zeitschrift für Vergleichende Rechtswissenschaft |

# Chapter 1 - Introduction

During the past two decades, innovations in the world of telecommunication and technology, the enlargement of the European Union and a growing integration of global markets for labour, capital and services have given rise to a steady increase in cross-border mergers, acquisitions and corporate restructurings.[1] This increased propensity towards international corporate migration is facilitated by the freedom of establishment,[2] the Regulation on the European Company,[3] the Regulation on the European Cooperative Society[4] and by the Directive on cross-border mergers.[5] Most of these cross-border operations are driven by companies' needs to be able to compete in the ever globalising economy. Both the intensification of global competition and the establishment of the internal market have contributed to the aforementioned trends. Moreover, the Great Recession of 2008 highlighted the need for businesses to adopt a more dynamic attitude towards cross-border corporate restructuring in order to remain competitive compared to other foreign and European companies. As such, reduced domestic competition has served as a catalyst for cross-border corporate activities, leaving developed market companies to seek corporate growth in emerging markets.[6] Still, the economic downturn caused a decline in cross-border mergers and acquisitions in the period of 2008-2009, with a tepid recovery until 2014.[7] In the aftermath of the recession, the continuing recovery of the global economy sparked a record-breaking high of cross-border mergers and acquisitions in 2015, due in part to stimulus measures undertaken by the European Central Bank.[8] This rise in cross-border commercial dealings illustrates the relevance of and may reignite the debate on employment

[1] Abramovsky & Griffith 2015, p.3; Farrell 2006, p. 2; Green paper 'Building a Capital Markets Union', COM [2015] 63 final.

[2] Art. 49 TFEU, Art. 54 TFEU.

[3] Council Regulation (EC) No. 2157/2001 of 8 October 2001 on the Statute for a European Company (SE) (OJ L 294, 10.11.2001, p. 1)

[4] Council Regulation (EC) No. 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE) (OJ L 207, 18.8.2003, p. 1)

[5] Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies.

[6] *Cf.* Farrell2006, p. 1-3; Zenner *et al.* 2008, p. 84;

[7] OECD Business and Finance Outlook 2015, p. 187.

[8] UNCTAD, *World Investment Report 2016*, p. 6.

protection in situations involving cross-border corporate restructuring, an issue that lies at the heart of the present research. At a European plane, the Acquired Rights Directive[9] provides for the safeguarding of employees rights in the event of a change in employer as a result of a legal transfer or merger. The prospect of increasing cross-border transfers of undertakings has been a consistent factor in the establishment and development of the Acquired Rights Directive which was originally enacted in 1977 to deal with the rise in international takeovers and amalgamations that would inevitably arise from the creation of a Common Market.[10] Being a staple of employment protection, the directive secures the automatic transfer of the rights and obligations stemming from the existing employment contract or relationship to the new employer and provides protection against dismissal in the event of a transfer of undertaking. At its core, the directive seeks 'to ensure that employees do not forfeit essential rights and advantages acquired prior to a change of employer'.[11] Typical examples of transfers of undertakings include mergers, acquisitions, demergers,[12] outsourcing transactions, transfers of production and the provision of ancillary services. The classification of any type of business restructuring as a transfer of undertaking triggers the application of the national provisions implementing the Acquired Rights Directive. These provisions tend to be geared towards domestic transfers of undertakings rather than dealing with a cross-border transfer scenario.[13] Additionally, the national laws of the European Member States differ significantly, due in part to the Acquired Rights Directive facilitating only partial and minimum harmonisation. As such, any cross-border transfer of undertaking may give rise to a plethora of questions of predominantly a private international law nature. From a legal perspective, any cross-border business relocation is tangent to several fields of law. A cross-border transfer of undertaking operates at the interface of corporate law, employment law, private international law and the European four

[9] Council Directive (EC) 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses [2001] OJ L82/16; This directive is included in the current research as Annex I.

[10] Nowadays frequently referred to as internal market.

[11] COM(74) 351, p. 3.

[12] Also known as divisions or spin-offs.

[13] Reiner 2010, p. 117.

freedoms.[14] This research holds a primary focus on the private international law aspects of cross-border transfers of undertakings, dealing both with questions relating to the conflict of laws and international jurisdiction. Any discussion of private international law, especially where it concerns the determination of the proper conflict of laws path, requires knowledge and understanding of substantive law. As such, the present research goes beyond a mere discussion within the realm of private international law and extends to the area of substantive employment law.

## 1. Research questions

As outlined above, this research primarily concerns the private international law implications of cross-border transfers of undertakings. Akin to its primary research object, i.e. the Acquired Rights Directive, the main emphasis of the present work is on transfers of undertakings originating from a European Union Member State (hereinafter also referred to as Member State or European Member State)[15] irrespective of the location of the transferred undertaking upon or immediately after the transfer. Therefore, a key factor in the present research is the cross-border relocation of the undertaking to be transferred. Once an undertaking or business is transferred from a Member State to another state that undertaking or business becomes part of a wholly new environment and it and its employees will likely be subject to new laws and regulations. Since the Acquired Rights Directive aims to protect employees in the event of a change in the natural or legal person responsible for carrying on the business a key question becomes whether this protection may be upheld within the new environment. As is its nature, the Acquired Rights Directive only brings about partial and minimum harmonisation, giving rise to differences in the employee protective regime throughout the Member States of the European Union. The question of whether the provisions stemming from the Acquired Rights Directive (continue to) apply in situations involving a cross-border transfer of undertaking is therefore equally important in situations involving a transfer

[14] I.e. the free movement of goods, services, capital and persons, including the free movement of workers and the freedom of establishment. *Cf.* Reiner 2010, p. 117; Niksova 2014, p. 1-2.

[15] Throughout the present thesis, all references to Member States or European Member States are references to the Member States of the European Union; where this is not the case this will be explicitly mentioned, *e.g.* where it concerns the Member States of the European Economic Area.

from one European Member State to another, i.e. in intra-European transfer scenarios, as it is in situations involving a transfer from a Member State to a non-Member State, i.e. an outbound-transfer scenario. In any event, all actors involved in the transfer, whether it be transferor, transferee or the affected employees, are best served with an easily established an proper determination of their legal position both before and after the transfer of undertaking. In establishing this legal position it is vital to determine the applicable law to a transfer of undertaking both upon and after the transfer of the business to the transferee. A proper determination of the applicable law requires the use of a clear and preferably uniform conflict of laws provision. The primary focus of the present research therefore lies in assessing the existing conflict of laws regime for transfers of undertakings and in determining whether this approach should be upheld or is in need of revision. In essence, the aim of this research lies in considering the necessity, desirability and (possible) shaping of private international law provisions for transfers of undertakings. This research is not limited to the area of the conflict of laws but additionally deals with the area of jurisdiction.[16] Whereas the issue of the appropriate conflict of laws solution to cross-border transfers of undertakings is and has been the subject of ongoing debate,[17] the issue of jurisdiction in relation to this area of law is one that is sparsely discussed. This is surprising, since it is important for all those involved in a transfer of undertaking to be aware of the court they can turn to in the event of a transfer-related dispute and more so, since the place of adjudication holds the key to determining the applicable law.[18] As such, this thesis seeks to outline the rules on jurisdiction and the conflict of laws pertaining to

[16] This research is limited to the private international law areas of conflict of laws and jurisdiction. As such it does not consider all aspects of private international law, leaving out the recognition and enforcement of foreign judgments; the area of private international law is generally considered to consist of three parts: jurisdiction, the conflict of laws and the recognition and enforcement of foreign judgments.

[17] See e.g. Haanappel-van der Burg 2016; Haanappel-van der Burg 2015; Niksova 2014, Henckel 2012; Junker 2012; Kania 2012; Gaul & Mückl 2011; Laagland 2011; Reiner 2010; Reichold 2008; Bittner 2000; Däubler 1994; Franzen 1994; Junker 1994; Mankowski 1994; Junker 1992; Richter 1992; Kronke 1989; Pietzko 1988; Däubler 1987; Birk 1982; Gamillscheg 1983; Kronke, 1981; Birk 1978; Gamillscheg 1959; Zweigert 1958; De Laat & Knipschild 2009; De Jong 2009; Franssen 2009.

[18] After all, the applicable law is determined on the basis of the private international law of the forum state.

cross-border transfers of undertakings, existing in the countries that have transposed the Acquired Rights Directive into their national law by reason of their membership to the European Union and intends to assess whether these rules are in need of revision. If such revision appears warranted an additional research aim lies in the determination of the most appropriate private international law path and the shaping of provisions relating to cross-border transfers of undertakings. In shaping such provisions and assessing and valuing the existing private international law path it is important to consider the overall purpose of private international law. This purpose may be described in different ways, but is generally considered to amount to an efficient and equitable regulation of the international legal relationships complicated by legal diversity.[19] Without setting a specific framework for its formation, any newly formed private international law provision should additionally do justice to the nature and purpose of the Acquired Rights Directive.

As outlined above, the primary purpose of this thesis is to establish the necessity, desirability and (possible) (re)shaping of private international law provisions for (cross-border) transfers of undertakings. The present research, in essence, pursues three aims:

- First, it seeks to analyse the existing rules on international jurisdiction and the conflict of laws relating to (cross-border) transfers of undertakings and their deficiencies;
- Second, its seeks to outline and critically evaluate the views on overcoming these deficiencies and their merits and demerits;
- Third, it intends to suggest the most appropriate and desired private international law path, possibly by offering suggestions for the shaping of coherent legislative rules on private international law in relation to cross-border transfers of undertakings.

In achieving these aims a plethora of additional research questions may arise, ranging from whether a transfer of undertaking can occur across national borders and whether the cross-border nature of such a transfer may prevent the undertaking from being transferred as a going concern and retaining its identity to whether the recent change in the scope of the

[19] Strikwerda 2015, p. 2; Van Loon, 1993, p. 136; Asser/Vonken 10-I 2013/2; De Winter 1962, p. 115; *Cf.* Knot 2008, p. 3 *et seq.*; Peters 2015.

Acquired Rights Directive, allowing its application to seagoing vessels, holds any implications for the conflict of laws.

## 2. Research method

Throughout legal doctrine, there has been a tendency to criticize the research methods utilised in legal research, questioning the scientific nature of the entire field of study.[20] Without participating in this legal theoretical battle of methods, I will recognize that there exist different approaches to legal research, some of which are of value in achieving the proposed research aims. In conducting my research in cross-border transfers of undertakings and the conflict of laws I have, akin to modern day private international law, made use of an eclectic approach. This eclectic approach is best described as a method of legal research that combines various approaches and methodologies depending on the aim of the research and the nature of the subject matter under discussion. In choosing the best available research method the principal consideration lies in whether a particular methodology will serve to fulfill the aims of the present research. To this end it should be noted that no singular method of legal science can fully succeed in answering any of the proposed research aims and questions. Only a combination of various methods of legal study combined with critical evaluation and interpretation can serve to fulfill the aims and purpose of this research. To this end, within the area of law there will always remain 'an area where only sound judgment, common sense or even intuition can be of any help. For when it comes to evaluation, to determining which of the various solutions is the best, the only ultimate criterion is often the practical evidence and the immediate sense of appropriateness.'[21] Still, any such evaluation deserves a firm basis in law and research and requires knowledge and understanding of the subject matter and its primary aim and purpose. The following subparagraphs will therefore discuss the various methods and approaches that, at least in part, have been utilized in this research.

[20] Barendrecht *et al.* 2004, p. 1419-1428; Buruma 2007, p. 1043; Smits 2009; Van Gestel & Vranken 2007, p. 1448-1461; Taekema & van Klink 2011, p. 1-10; Vranken, 2003; Van Boom 2013, p. 7-84; Koningsveld 2006; Sternberg 1988; Winkler 1989; *Cf.* Zweigert & Kötz 1998, p. 33 *et seq*.

[21] Zweigert & Kötz 1998, p. 33.

*2.1 Comparative approach*

A comparative approach is instrumental to the field of private international law. Such comparative approach or legal method not only aids the understanding of the nature and purpose of the conflict of laws but also helps to devise expedient, just and sensible solutions to problems of conflicting laws. As one of the primary prerequisites for the existence of private international law is legal diversity the charting of differences in national laws, first at a substantive level, demonstrates the need for private international law. Since the key purpose of the present research is to assess and identify the present conflict of laws regime in relation to cross-border transfers of undertakings and determine whether this regime should be upheld and if not, to decide on (and possibly devise) the most appropriate conflict of laws solution, a comparative approach is paramount to fulfilling this aim and establishing the workings of the present conflict of laws regime and illustrating and reiterating the need for the conflict of laws in relation to cross-border transfers of undertakings. In addition, comparative private international law is utilized to demonstrate the different conflict of laws approaches to cross-border transfers of undertakings that exist throughout the Member States of the European Union and to highlight the need for a unified European conflict of laws approach. After all, comparative private international law as a means by which the conflict rules of various countries are compared and foreign legal thought and doctrine is used to refine existing conflict of laws rules, is imperative to bridging gaps in the prevailing conflict of laws approach. An important consideration in the assessment of deploying a comparative method towards private international law lies in the notion that European private international law is, in several areas, still in the formative stage. The description of English private international law by *Cheshire* in 1935, now, roughly 80 decades onwards, perfectly characterizes the present state of European private international law, which is:

> ‘at the moment fluid not static, elusive not obvious; it repels any tendency to dogmatism, and, above all, the possible permutations of the

> questions that it raises are so numerous that the diligent investigator can seldom rest content with the solution that he proposes.'[22]

In an area of law that is still very much in flux and plagued by legal disparity, a comparative approach produces key considerations towards unification. In essence, the function of a comparative method in private international law is twofold. First, the approach aides in understanding the nature and existence of private international law, whereas second, a comparative approach at a private international law level helps promote the development and unification of private international law.[23] In researching the employment and conflict of laws effects of cross-border transfers of undertakings I have made use of both of these functions. First, in order to stress the existence of legal disparity and the need for private international law, the laws of the European Member States are compared at a substantive level. This comparison does not involve an extensive substantive level comparison of the laws of particular Member States, as such comparison would not serve to the benefit of displaying the need for private international law and fulfilling the proposed research aims. Thus, the ultimate purpose of utilizing such a comparative approach does not lie in providing a comprehensive and all-embracing overview of the possible substantive effects of a cross-border transfer of undertaking, but rather by employing examples of the substantive effects in the national laws of the Member States serves to cement the need for a clear and unified understanding of the conflict of laws in situations involving cross-border transfers of undertakings. Second, a comparative approach is operated at a conflict of laws level. In the determination of the existing and most appropriate conflict of laws path a comparison is made between the different conflict of laws approaches existing for transfers of undertakings throughout the Member States. Such comparison is paramount to answering the research questions on the existing conflict of laws approach(es) to cross-border transfers of undertakings and their efficiency.

*2.2 'Black letter approach'*

The black letter approach to law and legal research generally counts as the most common and is considered the traditional approach in legal science and legal research.[24] Under this approach the main sources of study are laws and

[22] Cheshire,1935, preface.
[23] Kalensky 1971, p. 244.
[24] Morris & Murphy 2011, Chapter 3; Ashford & Guth 2016, p. 135.

case law, and to a lesser extent academic writings. In essence, the black letter approach entails a primary focus on the letter of the law and aims to describe legal rules and provisions and provide commentary on their adoption and significance. In elucidating and understanding existing laws a black letter approach is invaluable. More so, a black letter approach may produce a deeper understanding of the foundations of legal arguments, enabling a proper evaluation of such arguments and their merits and demerits.[25] Throughout this thesis, a black letter approach is primarily utilized to outline and describe the existing legislation in relation to transfers of undertakings, both in the area of private international law and in substantive law. In doing so this approach answers fundamental questions on the content and application of the law and on the purpose of existing legislation.

*2.3 Legal historical approach*

The valuing of existing legal provisions and the shaping of new provisions in private international law requires a proper understanding of the history of the law and the nature and purpose of existing provisions. In adopting a legal historical approach the spirit of the law is decisive. In this, past knowledge forms a prerequisite for present knowledge; to understand the legal theory of any particular period one needs to adopt a historical approach.[26] Part of the present research therefore holds an overview of the historic development of the Acquired Rights Directive, the legislative process surrounding cross-border transfers of undertakings and the conflict of laws solutions provided therein. The use and purpose of this research methodology is not to describe the Acquired Rights Directive or a transfer of undertaking as a historical piece of legislation or a historical phenomenon, rather the idea is to draw from the historic developments in law in order to assess the existing law and devise a standard for future legislative action.

*2.4 Empirical approach*

A research method that is relatively new and that has rapidly evolved since the start of the 21st century is that which is known as empirical legal research.[27] Within the area of labour law, empirical studies on the effects of employment and labour legislation have been conducted for several decades.[28] Such studies however, are beyond the scope of this research.

[25] Van Gestel *et al.* 2013, p. 7.
[26] Howe 1950, p. 346.
[27] Heise 2002, p. 819 *et seq*.; Cane Kritzer *et al.* 2010, p. 1.
[28] Deakin 2009.

Whilst the conduction of empirical study is generally considered to enhance the scientific nature of any particular research no independent empirical research in the narrow sense has been conducted in this dissertation as such research would not serve to directly benefit the realisation of the proposed research aims. In this narrow sense empirical research comprises of a study of statistical, quantitative, data.[29] However, from a broader perspective, any form of legal study holds an inherent empirical component by reason of its focus on legislation and case law as a form of data.[30] Additional empirical components in traditional legal research may be found in e.g. a historical approach or in views and ideas on the impact of existing legislation. A broad definition of empirical research is the one proposed by Epstein and King:

> '(…) in this community, the word 'empirical' has come to take on a particularly narrow meaning – one associated purely with 'statistical techniques and analyses,' or quantitative data. But empirical research, as natural and social scientists recognize, is far broader than these associations suggest. The word 'empirical' denotes evidence about the world based on observation and experience. That evidence can be numerical (quantitative) or nonnumerical (qualitative); neither is any more 'empirical' than the other. What makes research empirical is that it is based on observations of the world – in other words, *data,* which is just a term for facts about the world. These facts may be historical or contemporary, or based on legislation or case law, the results of interviews or surveys or the outcome of secondary archival research or primary data collection. Data can be precise or vague, relatively certain or very uncertain, directly observed or indirect proxies, and they can be anthropological, interpretive, sociological, economic, legal, political, biological, physical or natural. As long as the facts have something to do with the world, they are data, and as long as research involves data that is observed or desired, it is empirical.'[31]

Based on this broader definition of empirical research, the notion that the present research is absent of any empirical data or evaluation no longer holds true, as it involves many 'facts about the world', based in legislation, case law, legal history or economic and social impact studies. However, as the narrow view corresponds to the general perception of what is considered empirical, the above requires no further elaboration. It will suffice to state

[29] Ludlow & Blackham 2015; IJzermans & van Schaaijk 2007, p. 29.
[30] *Cf.* Ludlow & Blackham 2015; Epstein & King 2002.
[31] Epstein & King 2002, p. 2-3.

that use is made of existing statistical empirical studies, especially where it concerns the economic background of cross-border transfers of undertakings and that such studies enrich this research,[32] but cannot serve to displace traditional legal methodology.

*2.5 Eclectic approach*

As outlined above, the present research employs an eclectic approach or mixed methodology combining several approaches to law. By doing so the present research overcomes the limitations of utilizing a single legal approach, ensures that preexisting assumptions are less likely to pollute the final result and stimulates new pathways of insight. Research methods are chosen on the basis of their suitability in answering a specific research question and their contribution to the overall purpose of this research. In addition, different approaches may be appropriate for different phases in the research process. Since no single method can succeed in fulfilling the proposed research aims, only a combination of various methods of legal study can serve to satisfy the overall aims and purpose of this research.

## 3. Research object

The object of this dissertation is the Acquired Rights Directive. Giving rise to an excess of case law in the employment area, the Acquired Rights Directive is one of the key legislative instruments within the European social arena. From 1977 onwards, the rights of employees in the event of change in employer resulting from a transfer of undertaking have been protected at a European level. On 14 February 1977 the Council of the European Communities adopted Directive 77/87/EEC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfer of undertakings, businesses or parts of businesses.[33] This directive was amended in 1998[34] and subsequently consolidated in the present Acquired Rights Directive of 2001. Whenever an undertaking or

[32] *Cf.* Baldwin & Davis 2003, p. 883; Gennet *et al.* 2006, p. 1.

[33] Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses [1977] OJ L61/26.

[34] Council Directive 98/50/EC of 29 June 1998 amending Directive 77/187/EEC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses [1998] OJ L201/88.

business is transferred to another employer as a result of a legal transfer or merger all rights and obligations arising from the existing employment contracts or relationships will automatically transfer to the transferee. The basic aim of the Acquired Rights Directive is to guarantee that employees continue to enjoy the rights they acquired prior to the transfer of undertaking taking effect. In other words the purpose of the directive is 'to ensure, as far as possible, that the contract of employment or employment relationship continues unchanged with the transferee, in order to prevent the workers concerned from being placed in a less favourable position solely as a result of the transfer'.[35] Seeking to achieve this purpose, the directive secures the automatic transfer of the employment relationship from the former employer to the new employer along with protection against dismissal and the right to information and consultation. Additional safeguards include the preservation of status and function of employee representatives and the observance of terms and conditions agreed in collective agreements. The directive is directed at the Member States of the European Union.[36] As the directive does not directly apply to individual actors within the Member States, the latter are required to transpose the provisions of the directive into their national legislation. Consequently, it is not the directive itself, but its national counterpart(s) that directly apply in the event of a change in employer resulting from a business transfer.

To give some insight into the rights and obligations provided by the Acquired Rights Directive the below will provide a short, non-comprehensive overview of the main provisions of the directive and their content:

*Definition of transfer* – The directive, by means of Article 1(a) applies to any transfer of an undertaking, business, or part of an undertaking or business to another employer as a result of a legal transfer or merger. This reference to a change in employer, rather than to a change in ownership, excludes transfers

[35] Case 105/84 *Foreningen af Arbejdsledere i Danmark v Danmols Inventar* [1985] ECR 2639.

[36] The directive equally applies to the EFTA signatories to the European Economic Area (hereinafter occasionally referred to as EEA), i.e. Norway, Iceland and Liechtenstein. See Article 68 of the Agreement on the European Economic Area, *OJ* [1994] L 1, p. 3, Annex XVIII, no. 32d.

of corporate control by reason of the mere acquisition of shares.[37] The definition of a transfer, which was long absent from the directive, is included in Article 1(b), which reads that : 'where there is a transfer of an economic entity which retains its identity, meaning an organized grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary'. This phrase forms a reflection of the case law of the European Court of Justice regarding the definition of the concept of transfer.[38]

*Retention of identity* – The European Court of Justice has set forth an ever-growing set of guidelines to help determine whether an *undertaking* has been transferred. In this, the decisive factor is whether the business was disposed of as a going concern, indicated by the resumption or continuation of its operation (with the same or similar activities) by the new employer, oftentimes described as the retention of identity. In determining whether the transferred undertaking has retained its identity the court has to weigh a number of factors outlined by the European Court of Justice in the seminal judgment of *Spijkers*.[39] In effect, the court has to take into account all the circumstances that characterise the undertaking in question such as the type of undertaking or business, the transfer of tangible assets, the value of intangible assets, the transfer of the majority of the employees, the transfer of customers as well as the degree of similarity between the activities carried on before and after the transfer and the period, if any, for which the activities were suspended.[40] All of these circumstances are single factors in an overall assessment and cannot be considered in isolation. It is for the national court to take these factors into account in its overall assessment of whether a transfer of undertaking has taken place.

*Automatic transfer* – Article 3(1) of the directive provides for the automatic transfer of all rights and obligations, such as salary, leave entitlements and seniority, stemming from the employment contract or relationship on the date of the transfer. The transferee thus automatically assumes the status of

[37] The original proposal for a directive of 1974 did not make such a distinction, it merely referred to the retention of employees rights in the case of mergers, take-overs and amalgamations; Jeffery 2003, p. 683.
[38] Case 287/86 *Landsorganisationen i Danmark for Tjenerforbundet i Danmark v Ny Mølle Kro* [1987] *ECR* 5465, para. 19.
[39] Case 24/85 *Spijkers* v. *Benedik* [1986] *ECR* 1119.
[40] Case 24/85 *Spijkers* v. *Benedik* [1986] *ECR* 1119, para. 13.

new employer, in the sense that all affected employees automatically become employed by the transferee at the moment the transfer takes effect.[41] Although the Member States may provide otherwise, such automatic transfer does not apply to old-age, invalidity or survivor's benefits that go beyond statutory security schemes.[42]

*Joint and several liability* – On the basis of the directive, the Member States may opt to provide that liability is joint and several between transferor and transferee. Article 3(1) of the directive states that it is at the option of the Member States to provide that 'after the date of the transfer, the transferor and transferee shall be jointly and severally liable in respect of operations that arose before the date of the transfer from a contract of employment or an employment relationship existing on the date of the transfer.'

*Collective agreements* –The Acquired Rights Directive in Article 3(3), to a certain extent, makes provision for the continuity of terms and conditions agreed in collective agreements. By reason of this Article 'the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement, until the date of termination or expire of the collective agreement or the entry into force or application of another collective agreement.' In situations where collective agreements are concluded between workers' and employers' associations and where these have not been declared generally binding, the directive does require the transferee to become party to the collective agreement existing at the business or undertaking of the transferor as this would limit the transferee's right to free association. Instead, Article 3(3) requires the transferee to uphold the terms and conditions agreed in the existing collective agreement.[43] The directive allows the Member States to limit this period of observance of a collective agreement up to one year.

*Protection against dismissal* – The directive, in Article 4, provides protection against dismissal in the event of a transfer of undertaking. Any

[41] More so, it is as if their employment contract or relationship was originally concluded with the transferee.

[42] Article 3(4) Acquired Rights Directive (Directive 2001/23/EC); this also applies to the terms and conditions observed in collective agreements.

[43] Proposal for a Directive of the Council on harmonization of the legislation of the Member States on the retention of the rights and advantages of employees in the case of mergers, takeovers and amalgamations, COM (74) 351 final/2, p.6-7; Beltzer 2008, p. 116-117.

dismissal by the transferor or the transferee either before or after the transfer is automatically deemed unfair, where the sole reason for the dismissal lies in the transfer itself. The provision bars dismissal by reason of the transfer, but allows dismissals for economic, technical or organizational reasons, commonly referred to as ETO reasons.

*Substantial change* – If a transfer of undertaking involves a substantial change in working conditions to the detriment of the employee, the employee may terminate the employment contract at the risk of the employer. In other words: if a transfer constitutes a substantial change in working conditions the employee is allowed to terminate the employment contract. By reason of Article 4(2) the employer will be regarded as having been responsible for such termination. According to the ECJ in the case of *Europièces* it is for the national court to determine (as is the case with all factual assessments under the directive) whether the changes in employment proposed by the transferee constitute a substantial change in working conditions.[44] Where this is assumed the national court is required to provide that the employer is to be considered responsible for the termination.[45] Whether a cross-border transfer of undertaking *per se* constitutes a substantial change in working conditions is discussed in Chapter 2.

*Insolvency* – In principle, Articles 3 and 4 of the directive (which secure the automatic transfer of employment rights, terms and conditions agreed in collective agreements and protection against dismissal) do not apply to insolvency proceedings.[46] Article 5(1) of the directive clearly excludes the

[44] Still the concept of substantial change is introduced by the directive and guarded by the European Court of Justice, as is clear from Case C-175/99 *Didier Mayeur v Association Promotion de l'Information Messine (APIM)* [2000] ECRI-7780, para. 56, in which the ECJ holds that ' any obligation, prescribed by national law, to terminate contracts of employment governed by private law, such obligation constitutes, in accordance with Article 4(2( of Directive 77/187, a substantial change in working conditions to the detriment of the employee resulting directly from the transfer, with the result that termination of such contracts of employment must, in such circumstances, be regarded as resulting from the action of the employer.'; Similarly Advocate General Léger in Case C-175/99 *Didier Mayeur v Association Promotion de l'Information Messine (APIM)* [2000] ECRI-7780, Opinion of AG Léger, para. 108.

[45] Case C-399/96 *Europièces SA v Wilfried Sanders and Automotive Industries Holding Company SA* [1998] ECR I- 6965, para. 44.

[46] Some Member States such as e.g. the Netherlands (Article 7:666(1)(a), Austria (§ 3(2) AVRAG), Malta (Article 38(4) EIRA) exclude insolvent undertakings from their national

application of the directive to the 'transfer of an undertaking, part of an undertaking or business where the transferor is the subject of bankruptcy proceedings or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor and are under the supervision of a competent public authority.' However, the Member States may decide to apply their national acquired rights provisions to the type of insolvency proceedings excluded in Article 5(1).[47] Where they have opted to do so, Article 5(2) and 5(3) provide legislative options.

*Employee representatives* – By reason of Article 6(1) of the directive the status and function of employee representatives is ensured on the same terms and conditions as existed before the transfer provided that the transferred undertaking preserves its autonomy. If the transferred undertaking's autonomy has not been preserved measures must be taken to ensure that the transferred employees continue to be properly represented until such time as the reconstitution or reappointment of employee representation in accordance with national law has taken effect. In essence, Article 6 aims to ensure a continuity of employee representation.[48] If, as a result of the transfer, the term of office of the representatives of the employees affected by the transfer expires, they shall 'continue to enjoy the protection provided by the laws, regulations, administrative provisions or practice of the Member States'.[49]

*Information and consultation* – Article 7 of the directive holds the information and consultation requirements. Article 7(1) obliges the transferor and transferee to inform the representatives of their respective employees affected by the transfer of: 'the date or proposed date of the transfer, the reasons for the transfer, the legal, economic and social implications of the transfer for the employees and any measures envisaged in relation to the employees.' All such information must be provided in good

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acquired rights provisions. However, in some cases, national acquired rights provisions may apply where a company is being rescued (such as in the Netherlands (*Cf.* Rb. Noord-Nederland 22 August 2014, ECLI:NL:RBNNE:2014:4598)).

[47] Some Member States such as e.g. Portugal (Article 285 *et seq.* CTrab), Germany (§613a BGB) and Spain (Article 44 ET) do apply their national acquired rights provisions to undertakings subject to insolvency.

[48] Commission Services' Working Document, Memorandum on rights of workers in cases of transfers of undertakings [2004], p. 10.

[49] Article 6(2) Acquired Rights Directive (Directive 2001/23/EC).

time either before the date of the transfer[50] or before the employees are directly affected by the transfer.[51] In the absence of any employee representatives, through no fault of the employees, the affected employees shall be informed individually.[52] If transferee and transferor envisage measures with regard to their employees, such as a reduction of the workforce, they are required to consult the representatives of these employees with a view to reaching an agreement.[53]

**4. Target countries and motives for transferring business abroad**

Any research regarding cross-border transfers of undertakings will surely benefit from some data on the frequency with which such cross-border transfers occur as such figures will underline the importance and relevance of such research. The same goes for some insight into the preferred target countries in international mergers, acquisitions and corporate restructuring activities such as outsourcing and offshoring. As such, this paragraph seeks to outline the economic background of cross-border mergers, acquisitions and other forms of corporate restructuring as well as summarise the main drivers for transferring business abroad or acquiring foreign companies. The majority of business transfers occurring within the European continent involve target businesses situated in other European countries.[54] In 2015 44% of the global number of cross-border mergers and acquisitions involved a target company located within the European Union, whereas 37% of the acquiring companies was located within a European Member State.[55] Primary target and acquiring countries within the European Union include the United Kingdom, Germany and France.[56] Main drivers for transferring business abroad or acquiring foreign businesses may be found in increased

[50] Where it concerns the transferor.

[51] Where it concerns the transferee.

[52] Article 7(6) Acquired Rights Directive (Directive 2001/23/EC).

[53] Article 7(2) Acquired Rights Directive (Directive 2001/23/EC).

[54] Dachs *et al.* 2006, p. 5-6.UNCTAD, *World Investment Report 2016,* Annex Table 11, 12; CBS,'Offshoring door Nederlandse bedrijven; een eerste grootschalig onderzoek in de industrie en dienstverlening' [2008]; Kania 2012, p. 32; Haanappel-van der Burg 2015, p. 2-3.

[55] UNCTAD, *World Investment Report 2016,* Annex Table 11, 12.

[56] Top five acquiring countries: the United States of America, the United Kingdom, France, Canada, Germany; Top five target countries: the Unites States of America, the United Kingdom, Germany, France, Spain.

competition, cost cutting considerations, the potential access to new and emerging markets and access to new technologies.[57] Where it concerns cross-border corporate restructuring through offshoring the target countries may vary depending on the type of business that is involved. Target countries may be selected on the basis of several factors such as the availability of skilled workers, cultural similarity, geographical vicinity, language requirements and political stability.[58] Throughout the European continent, in recent years, there has been a reversal from farshoring to nearshoring. Business activities are no longer predominantly offshored to distant countries such as China and India; instead offshoring frequently occurs within the same geographical region.[59] Eastern Europe has become an important target region in production and services offshoring, whereas Western Europe is a popular target region for developing new technologies.[60] Nearshoring offers significant advantages over farshoring as it offers geographical proximity, easier transportation, cultural alignment, language similarities and the ability to relocate and retain staff.[61] With European cross-border corporate mobility consistently gaining traction[62] the question of employment protection in cross-border restructurings and the applicability of the provisions stemming from the Acquired Rights Directive has become ever more important.

[57] UNCTAD, *World Investment Report 2016*, p. 6; CBS, 'Offshoring door Nederlandse bedrijven; een eerste grootschalig onderzoek in de industrie en dienstverlening' [2008], p. 12-13; Berenschot 2005; Gorter *et al.* , p. 15-16; Dachs *et al.* 2006, p. 7-10; Butterworth *et al.* 2013, p. 5.

[58] Dachs *et al*. 2006, p. 5.

[59] George, Frynas & Mellahi 2015, *p*. 269; Kania 2012, p. 32; Kvedaraviciene 2008, p. 563 *et seq*.

[60] Dachs *et al.* 2006, p. 9-10; Daub 2009, p. 196.

[61] Daub, Wiesbaden & Gabler 2009, p. 196; George, Frynas & Mellahi 2015, *p*. 269; Carmel & Abbott 2007, p. 44-45; Elix-RR, 'The rise of nearshoring. Can Manchester compete with Mumbai?' [2015], p. 5.

[62] Kania 2012, p. 32, 33; UNCTAD, *World Investment Report 2016;* Deloitte's 2014 Global Outsourcing and Insourcing Survey Report 2014. 2014 and beyond [available online at; http://www2.deloitte.com/content/dam/Deloitte/us/Documents/strategy/us-2014-global-outsourcing-insourcing-survey-report-123114.pdf, date of access 18 August 2016]; Giddens *et al.* 2006, p. 75; Crino 2009; *Cf.* Neelankavil & Rai 2009 p. 230 (on the increase of offshoring to India).

## 5. The Acquired Rights Directive and cross-border transfers

The Acquired Rights Directive was originally enacted in order to complement a surge in international takeovers and amalgamations accompanying the establishment of the Common Market. Hence, the directive was originally intended to accommodate cross-border transfers of undertakings. This is apparent from the proposal for a directive of 1974, which, in Article 10, provided a conflict of laws provision for the individual employment relationships affected by a transfer of undertaking.[63] The revised proposal of 1975, although clearly applying to cross-border transfers of undertakings,[64] did not comprise any conflict of laws provisions. The Commission eventually refrained from equipping the Acquired Rights Directive with provisions on the conflict of laws, as it was believed that this issue would be dealt with by the Regulation on the provisions of conflict of laws on employment relationships within the Community.[65] This regulation however was never enacted, leaving the Acquired Rights Directive without the envisaged complementary conflict of laws provisions on employment matters.[66] As such conflict of laws provisions, directly affirming which national acquired rights provisions apply in cross-border transfer situations, remain absent from the present Acquired Rights Directive until today as neither directive 77/187/EEC nor directive 98/50/EC implemented any conflict of laws provisions into the directive.[67] Complementary conflict of laws provisions, indisputably applying to transfers of undertakings, also

[63] Proposal for a Directive of the Council on harmonization of the legislation of Member States on the retention of the rights and advantages of employees in the case of mergers, takeovers and amalgamations, COM (74) 351 final/2; V/631/74-E.

[64] See COM (75) 429 final, Explanatory Memorandum p. 5-6. See Chapter 4, paragraph 2.1.

[65] Voorstel voor een verordening(EEG) van de Raad met betrekking tot het op arbeidsverhoudingen binnen de Gemeenschap toe te passen conflictenrecht, *OJ* [1972] C49/26 (proposal for a Regulation of the Council on the provisions of conflict of laws on employment relationships within the Community); Raadpleging van het Economisch en Sociaal Comité inzake een voorstel voor een verordening van de Raad met betrekking tot het op arbeidsverhoudingen binnen de Gemeenschap toe te passen conflictenrecht, *OJ* [1972] C142/5 (Consultation of the Economic and Social Committee with regard to a proposal for a Regulation of the Council on the provisions of conflict of laws on employment relationships within the Community); Amended proposal for a Regulation of the Council on the provisions of conflict of laws on employment relationships within the Community COM(75) 653 final; Hepple 1998, p. 7; Kronke 1989, p. 3.

[66] *Cf.* Hepple 1998, p. 8.

[67] Directive 2001/23/EC mere consolidated Directive 77/187/EEC and Directive 98/50/EC and did not effectuate any actual changes.

remain inexistent. The issue of cross-border transfers of undertakings however, did not entirely disappear from the European social arena as the Commission ordered a study, completed in 1998,[68] on the legal consequences of cross-border transfers of undertakings within the European Union. This study, conducted by *Hepple*, recognizes the difficulties that may arise from the absence of express conflict of laws provisions regarding transfers of undertakings and makes several recommendations for revising the directive. These recommendations however never made it into law. In recent years, the issue of cross-border transfers of undertakings regained the interests of the European Commission. Again, in 2006, a study was commissioned aiming to identify the main legal problems arising from the application of the provisions of the directive to cross-border transfers of undertakings.[69] In a 2007 report[70] the European Commission revealed its intentions to initiate a consultation of social partners with a view to amending the Acquired Rights Directive in order to better accommodate cross-border transfers of undertakings.[71] Putting flesh on the bones of these intentions, the Commission launched a first phase consultation of social partners on 20th June 2007.[72] In this first phase consultation the Commission recognized that 'the applicability of Directive 2001/23/EC to cross-border transfers with a change in the place of work raises a few important questions that cannot be answered by either the Directive or the existing instruments of private international law.' It therefore enquired whether social partners believed it necessary to amend the Acquired Rights Directive or to take any other type of Community action in order to deal with the issue of cross-border transfers that are coupled with a (cross-border) relocation of the transferred undertaking. Since the social partners believed that the existing instruments of Community private international law adequately dealt with any problems of private international law, the Commission decided not to

[68] Hepple 1998.

[69] Gaul *et al.* 2006 , hereinafter: CMS report.

[70] Commission Report on Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses [SEC(2007) 812].

[71] SEC(2007) 812, p. 10.

[72] First phase consultation of social partners under Article 138(2) of the EC Treaty concerning cross-border transfers of undertakings, businesses or parts of undertakings or businesses; Pursuant to Article 138(2) of the EC Treaty the consultation of social partners is required before proposals in the social policy field are submitted.

continue its legislative efforts.[73] The present research partly deals with the question of whether this cessation was justified and whether the present private international instruments do in fact adequately deal with the problems of private international law arising in relation to cross-border transfers of undertakings.

The most recent change to the Acquired Rights Directive involves the issue of seagoing vessels. Until recently seagoing vessels were excluded from the scope of the Acquired Rights Directive, leaving seafaring workers and their employment rights unprotected upon the transfer of a seagoing vessel. Whereas land-based workers and crews of inland navigation vessels[74] enjoyed the automatic transfer of the employment relationship from the transferor (i.e. the former employer) to the transferee (i.e. the new employer) as well as protection against dismissal and the right to information and consultation,[75] seagoing workers frequently found themselves without employment as a result of the transfer of the undertaking in which they were engaged. In a preparatory study for an impact assessment concerning a possible revision of the exclusions of seafaring workers from the scope of EU social legislation it was concluded that the transfer of a vessel often counts as grounds for redundancy.[76] In 2011, the Task Force on Maritime Employment and Competiveness, established to, among others, develop recommendations on striking a just balance between the employment conditions of European seafarers and the competitiveness of the European fleet,[77] concluded that the elimination of the exclusion of seagoing workers from several European social directives, including the Acquired Rights Directive would 'help eliminate the impression that seafarers are less well

[73] European Commission, *Industrial Relations in Europe* 2008, p. 135.

[74] See, e.g., Rb. Dordrecht 24 April 1996, ECLI:NL:RBDOR:1996:AM1891, *JAR* 1996/198.

[75] These three aspects of a transfer of undertaking are considered the three pillars of the Acquired Rights Directive.

[76] MRAG, 'European Commission. Preparatory study for an impact assessment concerning a possible revision of the current exclusions of seafaring workers from the scope of EU social legislation', Framework Service Contract, No. FISH/2006/09-LOT2, April 2010, p. 54, para. 313.

[77] Report of the Task Force on Maritime Employment and Competitiveness and Policy Recommendations to the European Commission, p. 1, available online at: <http://ec.europa.eu/transport/modes/maritime/seafarers/doc/2011-06-09-tfmec.pdf>.

protected by European Union labour law than other employees'[78], 'particularly when no clear justification'[79] for the exclusions exists. As such it proposed the elimination of the exclusion of seagoing workers from four European social directives, including the Acquired Rights Directive.[80] This elimination took effect in 2015, when the final directive was adopted. Directive (EU) 2015/1794[81], which aims to improve the working conditions of seafarers and their information and consultation, in Article 5, alters the scope of the Acquired Rights Directive by ensuring its application to seagoing vessels. Part of the aim of the present research is to assess whether these recent changes to the Acquired Rights Directive have any bearing on the conflict of laws and the preferred conflict of laws path.[82]

## 6. Existing academic knowledge and perspectives

In establishing the necessity, desirability and (possible) (re)shaping of private international law provisions for (cross-border) transfers of undertakings, the present dissertation intends to contribute to the existing

[78] Report of the Task Force on Maritime Employment and Competitiveness and Policy Recommendations to the European Commission, p. 14, available online at: <http://ec.europa.eu/transport/modes/maritime/seafarers/doc/2011-06-09-tfmec.pdf>.

[79] Report of the Task Force on Maritime Employment and Competitiveness and Policy Recommendations to the European Commission, p. 14.

[80] In addition the task force proposed the removal of exclusion provisions from Council Directive 2008/94 EC on the approximation of laws of the Member States relating to the protection of employees in the event of insolvency of their employer; Council Directive 2009/38/EC on European Works Councils and Directive 2002/14/EC establishing a general framework for informing and consulting employees in the European Community. In its 2013 proposal for a directive the European Commission extended this elimination to five social directives: Proposal for a directive of the European Parliament and of the Council on seafarers amending Directives 2008/94/EC, 2009/38/EC, 2002/14/EC, 98/59/EC and 2001/23/EC, COM (2013) 798 final.

[81] Directive (EU) 2015/1794 of the European Parliament and of the Council of 6 October 2015 amending Directives 2008/94/EC, 2009/38/EC and 2002/14/EC of the European Parliament and of the Council, and Council Directives 98/59/EC and 2001/23/EC, as regards seafarers, *OJ* [2015] L 263/1.

[82] A more recent development concerning the Acquired Rights Directive involves a possible consolidation of the directives in the area of information and consultation of workers. The European Commission has launched a first phase consultation of social partners to this effect: ' First phase consultation of social partners under Article 154 TFEU on a consolidation of the EU Directives on information and consultation of workers', C [2015] 2303 final. A detailed discussion of this development is beyond the scope of the current research.

academic debate as well as advocate legal reform. The research object and the essential research questions are approached from a private international law perspective. In achieving the research objectives a European gage is utilized, meaning that the point of departure is the Acquired Rights Directive itself rather than any national implementation provision. This choice for a European perspective is dovetailed with the aim of the present research which is to establish the necessity, desirability and (possible) shaping of private international law provisions for (cross-border) transfers of undertakings at a European level rather than at a purely national plane.

The present research can rely on settled knowledge in legal doctrine as there exist, especially in German legal doctrine, a variety of legal materials on the conflict of laws perspective to be deployed in relation to cross-border transfers of undertakings. In the past *quinquennium* several doctoral theses on the subject have emerged, notably by *Kania, Niksova* and *Haanappel-van der Burg*.[83] The present research however, offers a new perspective in the sense that it approaches the problem of cross-border transfers of undertakings from a European perspective, rather than departing from the national implementation laws of a particular European Member State (in the case of *Kania, Niksova* and *Haanappel-van der Burg* respectively Germany, Austria and the Netherlands).[84] Additionally, instead of dealing predominantly with the employment implications of cross-border transfers of undertakings, the primary focus of the present research lies in the area of private international law. Although research into the employment and conflict of laws effects of cross-border transfers of undertakings can rely on an assortment of legal knowledge, the present state of legal doctrine leaves several essential questions largely unanswered. For example, there exist few literature on the interaction between the Acquired Rights Directive and the existing private international law instruments of the Rome I Regulation and the Rome Convention, on the status of the provisions stemming from the Acquired Rights Directive and whether they can be classified as overriding mandatory provisions and on the question of how scope rules in secondary

[83] Kania 2012, Niksova 2014, Haanappel-van der Burg 2015.

[84] Although Kania's doctoral thesis in its title clearly purports the use of a European perspective all reasoning concerning the Acquired Rights Directive departs from the German national acquired rights provision of § 613a BGB.

European Union legislation relate to and fit in with the existing conflict of laws regime. Even fewer academic writings exist where it concerns the issue of jurisdiction and the conflict of laws effects of the inclusion of seagoing vessels into the Acquired Rights Directive. In fact, these are issues that have hitherto remained obscure from the existing academic debate.

Consequently, the relevance[85] and value of the present research lies in the fact that it broaches new developments such as the inclusion of seagoing vessels into the Acquired Rights Directive and the effects of such inclusion upon the conflict of laws. More so, it touches upon questions that have hitherto remained untouched in the academic debate, such as the issue of international jurisdiction in relation to cross-border transfers of undertakings and the appropriateness of the existing jurisdictional approach. In addition, the present research offers a different opinion on the preferred conflict of laws solution. It breaks with the notion that a transfer of undertaking is, in principle, subject to a *Statutenwechsel*, i.e. a change in applicable law, upon the relocation of the undertaking and makes a plea for considering (cross-border) transfers of undertakings as a separate conflict of laws category for which the location of the undertaking to be transferred is to be the deciding connecting factor.

## 7. Outline

The main purpose of this book is to establish the necessity, desirability and (possible) shaping of private international law provisions for (cross-border) transfers of undertakings. In achieving this aim the book, which consists of

[85] Commenting on Haanappel-van der Burg's doctoral thesis (Haanappel-van der Burg 2016), Duk considers any study on the conflict of laws relating cross-border transfers of undertakings to be of little practical relevance because the directive does not apply to a mere change in ownership, i.e. share deals. Duk 2016 ; Here Duk appears to forget that the Acquired Rights Directive although that the directive does apply to mergers and acquisitions structured as asset deals. More so, the directive does not solely apply to mergers and acquisitions, but also covers cross-border corporate restructurings, such as outsourcing and offshoring activities, which are frequently structured as asset deals. *A fortiori* share deals are not fully excluded from the application of national acquired rights provisions as some Member States, such as the United Kingdom, will apply their national acquired rights provisions to share deals where the new owner or shareholder takes over control of the transferred business [*Cf. Millam v The Print Factory* [2007] EWCA Civ 322*]*.

six separate Chapters, including this introduction, starts with a further introduction into the overall subject matter in Chapter 2. As such, the second Chapter provides an overview of the employment effects of cross-border transfers of undertakings. It deals with some of the larger substantive problems that may arise in situations involving a cross-border corporate relocation. The Chapter seeks to define the notion of a cross-border transfer of undertaking and to establish whether and under which conditions such transfers are within the remit of the Acquired Rights Directive. It answers the question whether a transfer of undertaking may take effect across national borders. In doing so, it establishes whether the cross-border nature of the transfer prevents the undertaking from being transferred as a going concern and retaining its identity. The Chapter will demonstrate that the problems arising from or in relation to cross-border transfers of undertakings are largely rooted in the differences existing in the laws of the Member States and the absence of a clear and universally accepted conflict of laws path. The Chapter provides the reader with a deeper understanding of the subject matter and its importance by outlining some of the main differences existing in the laws of the Member States and signaling the primary problems that exist in relation to cross-border transfers of undertakings. In effect, Chapter 2 serves as a prelude to the nucleus of this research, i.e. the Chapters on jurisdiction and the conflict of laws.

Chapter 3, which deals with the issue of international jurisdiction, serves a dual purpose: first, it seeks to outline the rules on jurisdiction pertaining to cross-border transfer of undertakings existing in the European Member States and second, it intends to assess whether these rules on jurisdiction are in need of revision. In establishing whether there is a need for such a revision the question is posed whether the problems that exist within the realm of the conflict of laws (Chapter 4) equally exist when it comes to establishing jurisdiction in matters relating to cross-border transfers of undertakings. The primary focus of this Chapter lies on the private international law instrument of the Brussels I bis Regulation,[86] which holds

[86] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), *OJ* [2012] L 351/1.

the principal rules on international jurisdiction in civil and commercial matters.

Chapter 4 forms the heart of the present research and concerns the issue of the conflict of laws. Whereas Chapter 2 served to highlight the need for clear and uniform conflict of laws provisions regarding transfers of undertakings at a European plane, the fourth Chapter seeks to assess and define the rules that determine the applicable law in the event of a cross-border transfer of undertaking. In doing so, the Chapter critically evaluates the large variety of views and ideas on the method through which the law applicable to a transfer of undertakings is and should be obtained. Additionally, it establishes and identifies the existing method through which the law applicable to a cross-border transfer of undertaking is to be determined. As the ultimate aim of this Chapter is to assess and identify the present conflict of laws regime in relation to cross-border transfers of undertakings and to determine whether this regime should be upheld or is in need of revision a strong emphasis lies on the existing conflict of laws path and its merits and demerits. One of the most important findings of this Chapter is that the Member States deal with the issue of the conflict of laws in different ways. Therefore a plea is made for the introduction of a new and uniform conflict of laws path for transfers of undertakings. The Chapter concludes with suggestions for changes to the Acquired Rights Directive and the introduction of a separate conflict of laws category for transfers of undertakings.

Chapter 5 addresses the inclusion of seagoing vessels into the Acquired Rights Directive and the effects of such inclusion upon the conflict of laws. In 2015, the scope of the Acquired Rights Directive was amended to include seagoing vessels that are part of a transfer of undertaking.[87] The application of the directive to seagoing vessels is dependent upon the location of the transferee or the location of the undertaking upon completion of the transfer. As such, a different territorial scope exists for seagoing vessels then for land-based undertakings. For the latter the location of the undertaking after the transfer is irrelevant, whereas in case of the former the location after the transfer holds an important consideration for the application of the directive

[87] Directive (EU) 2015/1794 of the European Parliament and of the Council of 6 October 2015 amending Directives 2008/94/EC, 2009/38/EC and 2002/14/EC of the European Parliament and of the Council, and Council Directives 98/59/EC and 2001/23/EC, as regards seafarers, *OJ* [2015] L 263/1.

and its national counterparts. The primary purpose of Chapter 5 is to assess whether the special characteristics of the maritime sector, its inherent cross-border and international features, combined with the recent revision of the Acquired Rights Directive, give rise to a special conflict of laws consideration of seagoing vessels in relation to transfers of undertakings. The Chapter concludes with a discussion on the preferred conflict of laws approach an critically assesses the recent changes to the Acquired Rights Directive. The ultimate conclusion holds that the inclusion of seagoing vessels into the Acquired Rights Directive requires a revision of the conflict of laws rule proposed for transfers of undertakings in Chapter 4. Suggestions for such a revision and the shaping of conflict of laws provisions for transfers of undertakings are made.

The final Chapter concludes the present research by outlining the preferred private international law path for transfers of undertakings and by offering recommendations and suggestions for a conflict of laws provision to be included into the Acquired Rights Directive. In effect, the final Chapter brings together the conclusions of the previous Chapters and offers some additional comprehensive insights.

# Chapter 2 - Cross-border issues (substantive effects)

## 1. Introduction

The Acquired Rights Directive was originally created to deal with a rise in international takeovers and amalgamations that would inevitably arise from the creation of a Common Market.[88] Since the directive's inception in 1977, the number of cross-border mergers and takeovers have been consistently on the rise.[89] Combined with the innovations in the world of telecommunication, the enlargement of the European Union and general globalization cross-border or international takeovers, mergers and outsourcing activities are likely to occur ever more often. This increased propensity towards international migration at a company level, which is facilitated by the freedom of establishment,[90] the Regulation on the European Company,[91] on the European Cooperative Society[92] and by the Directive on cross-border mergers, raises questions as to the effects of this migration upon the position of the affected employees. To this end, the Acquired Rights Directive, throughout the Member States of the European Union[93], provides for the safeguarding of the rights and obligations of employees upon a transfer of undertaking. However, as neither the Acquired Rights Directive nor its national counterparts provides for an express application to cross-border transfers of undertakings their application beyond national frontiers has on occasion been questioned.[94] The absence of any explicit provisions regarding cross-border transfers of undertakings may therefore result in uncertainty on the part of employers and employees. This uncertainty was one of the main drivers behind the European Commission's

[88] Nowadays frequently referred to as internal market.
[89] Manchin 2004, p. 4, 6 *et seq.* ; Coeurdacier *et al.* 2009, p. 7.
[90] Art. 49 TFEU, Art. 54 TFEU.
[91] Council Regulation (EC) No. 2157/2001 of 8 October 2001 on the Statute for a European Company (SE) (OJ L 294, 10.11.2001, p. 1)
[92] Council Regulation (EC) No. 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE) (OJ L 207, 18.8.2003, p. 1)
[93] The directive likewise applies to the EFTA signatories to the European Economic Area, i.e. Norway, Iceland and Liechtenstein.
[94] Radé 2006, p. 291.

consultation of social partners[95] with a view to amending the Acquired Rights Directive in order to better accommodate cross-border transfers of undertakings.[96] This Chapter deals with some of the larger substantive problems that may arise in situations involving a cross-border transfer of undertaking. First however, it seeks to define what constitutes a cross-border transfer of undertaking and to establish whether and under what conditions these transfers are within the scope of the Acquired Rights Directive. Second, it seeks to establish whether a transfer of undertaking can occur across national borders. In doing so, it is imperative to establish whether the cross-border nature of the transfer prevents the undertaking from being transferred as a going concern and retaining its identity. Once these first two issues have been addressed the Chapter turns to some of the substantive effects of a cross-border transfer of undertaking. Not all substantive employment effects are discussed. Only those effects that, compared to domestic transfers of undertakings, raise additional questions or cause additional problems due to the cross-border nature of the transfer are considered of interest. In dealing with the combined issues of this Chapter the intention is not to provide an in depth analysis of the legal systems of the Member States of the EU and their provisions transposing the Acquired Rights Directive. Instead, reference is made to the national acquired rights provisions in order to illustrate the differences in national transposition measures, highlighting the need for conflict of laws provisions at a European level. In addition, the present Chapter will show that the problems arising from or in relation to cross-border transfers of undertakings are largely rooted in the differences between the laws of the Member States and the absence of a clear and universally accepted conflict of laws path. Thus, the aim of this Chapter is not to provide a comprehensive and all-embracing overview of the possible substantive effects of a cross-border transfer of undertaking, but rather to utilize the substantive effects to outline the need for a clear and unified understanding of the conflict of laws in situations

[95] First phase consultation of social partners under Article 138(2) of the EC Treaty concerning cross-border transfers of undertakings, businesses or parts of undertakings or businesses, available online at: <http://ec.europa.eu/social/BlobServlet?docId=2442&langId=en>,

[96] See: Commission Report on Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, COM(2007)334 final, p. 10.

involving a cross-border transfer of undertaking. In this sense, the present Chapter constitutes a prelude to the heart of this research, i.e. the Chapters on jurisdiction and the conflict of laws.

## 2. Definition

For the purposes of this research, it is important to establish a clear definition of a cross-border transfer of undertaking. As such, this paragraph seeks to define what is meant by the term cross-border transfer and, in doing so, intends to provide insight into several cross-border transfer of undertakings scenarios. Obviously a cross-border transfer of undertaking requires some foreign element as otherwise the transfer would be purely domestic in nature. In general, a cross-border transfer of undertaking is bound to transpire whenever the transferor and transferee[97] are governed by the laws of different States, whether this is a Member State of the EU, the EEA or a third country.[98] In addition, the foreign element may lie in the location of the transferred undertaking after the transfer. Thus, either the person of the transferee or the location of the transferred undertaking may constitute the foreign element in a cross-border transfer of undertaking. Frequently, the two will coincide, i.e. the transferred undertaking will relocate to the country of the (foreign) transferee upon or immediately after the transfer. As such, a variety of cross-border transfer of undertakings situations can be distinguished:

1. The undertaking to be transferred is situated in an EU Member State. By reason of the transfer this undertaking is transferred to a foreign transferee (governed by the laws of either a Member State of the EU,

[97] The terms transferor and transferee are clearly defined by Article 2(1)(a) and (b) of the Acquired Rights Directive. Transferor means 'any natural or legal person who, by reason of a transfer within the meaning of Article 1(1), ceases to be the employer in respect of the undertaking, business or part of the undertaking or business'; 'transferee' means 'any natural or legal person who, by reason of a transfer within the meaning of Article 1(1), becomes the employer in respect of the undertaking, business or part of the undertaking or business'

[98] *Cf.* Hepple 1998, p. 3. Here it is important not to confuse the law governing the transferor (and transferee) with the location of the undertaking to be transferred, as an undertaking governed by a particular law does not necessarily operate only businesses in the state of its *lex societatis.* As such a French transferor may e.g. transfer part of an undertaking situated in Spain to a Portuguese transferee.

the EEA or a third country). The location of the transferred undertaking does not change as a result of the transfer;
2. The undertaking to be transferred is situated in an EU Member State. As a result of the transfer, this undertaking is relocated to a different EU Member State, most likely the Member State of the transferee. For the purposes of this research, this type of transfer shall be referred to as an intra-European transfer;
3. The undertaking to be transferred is situated in an EU Member State. As a result of the transfer this undertaking will transfer and be relocated to a third state. This type of transfer will henceforth be referred to as an outbound transfer;
4. The undertaking to be transferred is situated in a third state. As a result of the transfer this undertaking is transferred and relocated to an EU Member State. These types of transfer situations, involving a transfer of undertaking from a third state to a Member State will, for the purposes of this research be characterized as inbound transfers.

*2.1 Transfer without relocation*

In the first scenario, where the foreign element is simply to be found in the person of the transferee both the actual and legal position of the employees will remain virtually unaffected upon the transfer of undertaking. Since the transfer of undertaking is not accompanied by a cross-border relocation, the location of the transferred undertaking will not change as a result of the transfer. As such, the employees will continue their employment with the transferee on the exact terms and conditions[99] and in the exact location as existed with the transferor. For instance, a Luxembourg' company may decide to acquire a production business previously operated by a Dutch company in the Netherlands. In order to properly continue the transferor's operations the Luxembourg' company takes over the entire business, including tangible and intangible assets, such as machinery, plants and intellectual property, the client base and the majority of the workforce. After the transfer, the Luxembourg' company continues the business' operations at the exact location previously operated by the Dutch company. In this scenario there will be little to no change in the working conditions of the affected employees due to the nationality (or *lex societatis*) of the transferee.

[99] *Cf.* Article 3(1) Acquired Rights Directive (Directive 2001/23/EC).

In fact, the transfer of undertaking does not substantially differ from a transfer to a domestic transferee[100]; the transferred employees will continue their employment on the exact terms and conditions that existed with the transferor, this includes the location of the performance of their obligations towards their employer, i.e. their place of work. For the purposes of this research this type of transfer therefore holds a similar position as a purely domestic transfer. Surely, a transfer between a transferor and transferee who are located within different countries is encompassed by the definition of cross-border transfer of undertaking.[101] However, due to the minimal effects of such a transfer on the affected employees (compared to a domestic transfer of undertaking), the term cross-border transfer of undertaking, for the purposes of this research, refers to a transfer that is accompanied by a cross-border relocation of the undertaking.

*2.2 Intra-European transfer*

The second scenario involves the so-called intra-European transfer of undertaking. In this scenario an undertaking is transferred from an EU Member State to another EU Member State. In other words, upon or immediately after the transfer, the transferred undertaking is relocated to another Member State, i.e. a Member State other than its state of origin. Thus, the laws of both the state of origin and the state of destination will possess national provisions transposing the Acquired Rights Directive and are consequently equipped with a provision effectuating a transfer of undertaking. In these situations the transferor and transferee are likely to be governed by the laws of a Member State, this however is not a prerequisite for the classification as intra-European transfer of undertaking. The deciding factor for this category is that the undertaking is situated in a Member State both before and after the transfer, provided that the transfer is coupled with a cross-border relocation to another Member State. In this situation, where all relevant foreign elements are based in a Member State, the Acquired Rights Directive undisputedly applies. All that rests is assessing which national acquired rights regime(s) apply or applies to the whole or part of the transfer of undertaking as surely the nature of the directive prevents the Acquired Rights Directive from being directly applicable to individual actors within

[100] Loritz 1987, p. 84.
[101] *Cf.* Bittner 2000, p. 458; Junker 1992, p. 236 *et seq.*

the Member States.[102] There exist several examples in the case law of the European Member States that deal with intra-European transfers of undertakings. For instance, in 2008 the Dutch *Kantonrechter* of *Eindhoven* determined that the transfer of production activities from SMC BV in the Netherlands to a member of the same corporate group: SMC NV in Hooghalen, Belgium constituted a transfer of undertaking within the meaning of the Dutch acquired rights provisions, i.e. Art. 7:662 *et seq.* BW.[103] In assessing whether a transfer of undertaking took place the court noted that given the European law background of the Dutch acquired rights provisions the application of Belgian law would most likely provide the same legal framework.[104] A similar assessment is made by the German *Landesarbeitsgericht* of Hamburg in a case involving the transfer of (part of a) press agency from Hamburg, Germany to an Irish subsidiary in Ireland.[105] According to the *LAG* the Acquired Rights Directive, in case of a transfer of an undertaking or part of an undertaking from a German based transferor to a legal entity in another Member State, guarantees a minimum level of protection for the affected employees. This includes (transfers to) Ireland.[106] However, since the Acquired Rights Directive only intends to effectuate partial and minimum harmonisation, there exist differences in the level of protection offered to the affected employees throughout the Member States. Several key concepts of the Acquired Rights Directive, such as the notion of employee, are defined by national law. As such, it may be that a particular employee is protected under the laws of the country of origin whereas such protection does not exist under the laws of the country of destination. In addition, the directive ensures that the rights and obligations arising from an employment contract or relationship on the date of the transfer shall transfer to the transferee by operation of law.[107] To this end, differences remain as to

[102] See Chapter 4.

[103] Ktr. Eindhoven (Vzngr.) 31 October 2008, ECLI:NL:HR:2008:BD2408., *JAR* 2008/271.

[104] Ktr. Eindhoven (Vzngr.) 31 October 2008, ECLI:NL:HR:2008:BD2408, *JAR* 2008/271 , para. 3.3.4.

[105] LAG Hamburg, 22 May 2003 – 8 Sa 29/03, BeckRS 2003 30459179.

[106] LAG Hamburg, 22 May 2003 – 8 Sa 29/03, BeckRS 2003 30459179, *Entscheidungsgründe* I.5: What is interesting in this case is that the plaintiff (one of the affected employees) was willing to transfer to Ireland and contested the termination of his employment contract or relationship.

[107] Article 3(1) Directive 2001/23/EC.

what these rights and obligations encompass.[108] Another example is the right of the affected employees to object to the transfer of their employment relationship. Although the ECJ has clearly established that the employees possess these rights, the effects of such an objection are to be determined by national law.[109] Surely, legal diversity is an inevitable result of partial and minimum harmonisation. In intra-European transfer scenarios the Acquired Rights Directive ensures a minimum level of protection for the employees affected by the transfer. Whenever an undertaking is transferred from one Member State to another Member State the rights and obligations stemming from the existing employment contracts and relationships automatically transfer to the transferee, as a result of which the affected employees become employed by the transferee. Thus, in summary, in intra-European transfer situations, the Acquired Rights Directive applies without fail. An assessment of which national acquired rights provisions apply in specific situations, when an undertaking or part of a business or undertaking is transferred from one Member State to another, is however still required.[110] From an employee perspective, an additional advantage[111] of an intra-European transfer is that, due to the existence of a regulation on judicial cooperation, i.e. the Brussels I Recast[112], the national acquired rights provisions appear easily enforced, especially compared to transfers of undertakings to a non-Member State transferee, involving a relocation to a non-Member State, a scenario that will be discussed in the following subparagraph.

*2.3 Outbound transfer*

The third scenario involves the transfer of an undertaking from an EU Member State to a non-EU Member State. In other words, under this scenario, an undertaking situated in a Member State is transferred and relocated to a non-Member State, popular examples of which are outsourcing

[108] *Cf.* Thoelen 2015, No. 115.

[109] Joined Cases C-132/91, C-138/91 and C-139/91 *Grigorios Katsikas v Angelos Konstantinidis and Uwe Skreb and Günter Schroll v PCO Stauereibetrieb Paets & Co. Nachfolger GmbH* [1992] ECR I-06577, ECLI:EU:1992:517, para 37.

[110] See Chapter 4.

[111] The first advantage being that the rights and obligations of the affected employees are without fault safeguarded in the event of an intra-European transfer of undertaking.

[112] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast) *OJ* [2012] L 31/1.

to India or China. There have been few documented cases involving a transfer of undertaking from a Member State country to a third state, i.e. a state outside the European Union.[113] It has, on occasion, been argued that the Acquired Rights Directive and its national counterparts do not apply to the particular situation in which an undertaking, business or part of a business or undertaking is transferred outside the European Union as a result of the transfer.[114] This argument, however, as will be demonstrated in paragraph 3, is contrary to the scope of the Acquired Rights Directive. The directive applies 'where and in so far as the undertaking, business or part of the undertaking or business to be transferred is situated within the territorial scope of the Treaty'.[115] As such, the directive applies to a transfer of undertaking between Member States and to third countries alike. The decisive factor in determining the territorial scope of the directive is the location of the undertaking to be transferred. Thus, if prior to the transfer (regardless of its destination upon relocation) the undertaking is situated within a European Member State the Acquired Rights Directive applies.[116] In

[113] See *e.g.*: BAG 26 May 2011 – 8 AZR 792/09 BeckRS 2011, 76553; *Holis Metal Industries Limited* v. *(1) GMB (2) Newell Limited* [2008] IRLR 187, Appeal No. UKEAT/0171/07/CEA;; Cass. soc., 5 avr. 1995, n° 93-42.690; Cour de Lyon, Ch. Soc. 11 May 1993, *Dr. Soc.* 1993, p. 650; *Cf.* Cour de Cassation (Ch. Soc.) 23 October 1974, opinion : Lyon-Caen *RDIP* 1976, p. 87 *et seq.* (where no outbound transfer was assumed).

[114] *Cf.* Niksova 2014, p. 59-61, 67, 68; UAPME 2007, p. 2; CMS report 2006, p. 68-69; Drobnig & Puttfarken 1989, p. 81, 88.

[115] Art. 1(2) Acquired Rights Directive (Directive 2001/23/EC).

[116] As such, outside the European Union there will exist different or no rules on transfers of undertakings. On occasion an automatic transfer of the rights and obligations stemming from the existing employment contract will be provided for in the laws of a non-Member State. For example, Switzerland in Article 333 OR (The current phrasing of Article 333 OR is modelled on Directive 77/187/EEC. After a negative public referendum regarding the accession to the European Economic Area, the wording of the original Article 333 OR was altered as part of the so-called Swiss-Lex-Vorlage, entailing more consistency with EU law; *Cf.* Oesch 2012, p. 17; Lorandi 2000). Similar automatic transfer rules appear to exist in Brazil, with regard to transfers within corporate groups and transfers by acquisition (Martinius 2005, p. 25; Brancher *et al.* 2015). South Africa also provides that the transferee automatically enters into the position of the transferor with respect of the employment contracts existing on the date of the transfer. Art. 197 of the *Wet op Arbeidsverhoudinge*, which is modelled on European law, i.e. the Acquired Rights Directive, requires the transfer of a business, trade or undertaking or part thereof as a going concern.[116] If such a transfer has occurred, the transferee automatically takes the place of the transferor with regard to the employment contracts existing on the date

outbound transfer scenarios, the coming into existence of a transfer of undertaking does not fail on the basis of the territorial scope of the directive. It may be however that a transfer of undertaking does not arise due to the absence of other factors, such as the retention of identity.[117] The case *Vidéocolor*[118] before the *Chambre Social* of the French *Cour de Cassation* involved the transfer of part of an undertaking, located in Lyon, to Brazil. *Vidéocolor* was a company part of the corporate group *Thomson Tubes et Displays*, and as such involved in the fabrication and marketing of picture tubes and their components to be used in colour televisions. The company operated from two locations, one in Genlis and one in Lyon (both located in France). In order to remain competitive it decided to reduce costs via corporate restructuring; the facility in Lyon was closed and part of its activities were moved to Genlis whereas the other part was transferred to a factory in Belo Horizonte, Brazil belonging to another company within the Thomson group. Of the 318 employees in employment at the site in Lyon, 274 were transferred abroad whereas 47 transferred to the remaining establishment in France.[119] The success of a social plan set up for the employees was limited as some of them even refused to transfer to Genlis roughly 200 km away from Lyon.[120] As such, the company proceeded to collective redundancies. The *Cour de Cassation* stated that the employment contracts did not transfer to the transferee. Its reasons underlying this decision are minimal and appear to be largely founded in the fact that the company moved abroad to a 'different environment':

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of the transfer.[116] The rights and obligations existing between the transferor and the employee continue to exist between the transferee and the employee.[116]

[117] The issue of retention of identity will be addressed in paragraph 4. To this end it will be questioned 'whether it is possible to for an entity to retain its identity when that entity moves from one country to another'.

[118] Cass. soc., 5 April 1995, n° 93-42.690; Cour de Lyon, Ch. Soc. 11 May 1993, *Dr. Soc.* 1993, p. 650; *Cf.* Cour de Cassation (Ch. Soc.) 23 October 1974, opinion : G. Lyon-Caen, *Revue critique de droit international privé* 1976, p. 87 *et seq.*

[119] Cour de Lyon, Ch. Soc. 11 May 1993, *Dr. Soc.* 1993, p. 651.

[120] In this regard, it should be stated that the transfer to Genlis, merely involves a change in the place of employment, it does not constitute a transfer of undertaking within the meaning of the Acquired Rights Directive or L. 122-12 CC, since it does not involve a change in (the person of the) employer. *Cf.* Savatier 1993, p. 648.

> *'Qu'en statuant ainsi, alors que l'établissement de Lyon de la société Thomson Tubes et Displays avait été fermé et que l'activité s'exerçait sur d'autres sites, notamment à l'étranger, dans un milieu différent, ce dont il résultait que les emplois y avaient été supprimés, (...).'*[121]

In this sense, employment is not merely characterized by the task to be accomplished but also by the environment in which the employment is carried out.[122] On the basis of the case in *Vidéocolor*, even though this conclusion is not drawn by the *Cour de Cassation* itself, it has on occasion been presumed that if an undertaking is transferred abroad, to a different environment, the undertaking to be transferred may not be able to retain its identity.[123] Still, it has been considered possible for a transferred undertaking to retain its identity upon a transfer to a non-Member State transferee and a non-Member State country. An outbound transfer was assumed in the case of *Holis* before the United Kingdom's Employment Appeal Tribunal, which involved a transfer from the UK to Isreal. The track and pole part of a track, pole and blind manufacturing business of a UK company operating from Tamworth, UK, was transferred to an Israeli based company as well as relocated to Isreal. The 107 employees employed in the part of the business to be transferred were informed of the transfer to the transferee. They were notified that unless they wished and agreed to move to Israel they would be made redundant following the transfer due to the transfer of the operation to Israel. None of the affected employees moved to Israel, leaving them to be dismissed by the transferee shortly after the transfer. A claim was consequently made by an employee representative organization on behalf of the employees for an alleged breach of the duty to consort on the basis of regulation 13 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) and the collective redundancy consultation obligations contained in section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 (the 1992 Act). With respect to the

[121] Here the *Cour de Cassation* simply states that the site in Lyon has been closed and its activities transferred to different sites, in particular abroad, to a different environment, resulting in the loss of employment.

[122] J. Savatier, 'Délocalisations d'activités et cause réelle et sérieuse de licenciement', *Dr. Soc.* 1993, p. 648.

[123] CMS Report 2006, p. 17; *Cf.* Veldmaat & van Assendelft de Coningh 2012, p. 26; IDS 2011, p. 498.

applicability of Member State acquired rights provisions in outbound transfer situations, *Judge Ansell* argued that:

> 'Set against the purpose of protecting the rights of workers in the event of change of employer it seems to me that a purposeful approach requires that those employees should be protected even if the transfer is to be across borders outside the EU.'[124]

The Tribunal recognized that the enforcement in situations involving outbound transfers may give rise to certain difficulties. However, *Judge Ansell* stated that 'in these days of multi-national corporations and economic interdependency I would regard the issue of enforcement as less difficult then it used to be.'[125] Still, where the undertaking is physically relocated from a Member State to a third country issues of enforcement within that third country will be determined by the private international law of that particular country. It is unlikely that there will exist a mutual trust in the legal systems of the countries involved akin to that existing in the European Union with regard to judicial cooperation.[126] Nonetheless, the absence of such mutual trust does not, under application of the laws of a Member State, displace the employees' legitimate interests in and entitlement to the continuation of the rights and obligations stemming from their employment relationship.

*2.5 Inbound transfer*

The last transfer scenario is that of the inbound transfer, involving the transfer from a third state to an EU Member State. As paragraph 3 will show, the Acquired Rights Directive does not apply to a transfer from a non-Member State to a Member State since it requires the transferring undertaking to be situated within Member State territory prior to the transfer (i.e. the undertaking to be transferred needs to be situated within EU territory for the Acquired Rights Directive to apply). Surely, as the Acquired Rights Directive only intends to provide partial harmonization the Member States,

[124] *Holis Metal Industries Limited* v. *(1) GMB (2) Newell Limited* [2008] IRLR 187, Appeal No. UKEAT/0171/07/CEA, para. 41, p. 26.
[125] *Holis Metal Industries Limited* v. *(1) GMB (2) Newell Limited* [2008] IRLR 187, Appeal No. UKEAT/0171/07/CEA, para. 43, p. 27.
[126] *Cf.* Weller 2015; Kramer 2013, p. 343-373.

per Article 8 of the Acquired Rights Directive, are free to introduce rules and regulations that are more favourable to the affected employees and are therefore fully allowed to expand the scope of their national acquired rights provisions to include inbound transfer scenarios. For example, by reason of Article 1(4) of the Spanish *Estatuto de los Trabajadores*[127] it appears that the Spanish national acquired rights provision of Article 44 *Estatuto de los Trabajadores* may also apply to businesses of undertakings outside Spanish territory, belonging to Spanish undertakings.[128] Article 1(4) provides that Spanish labour law applies to Spanish workers hired in Spain to work for Spanish companies abroad, subject to the public policy of the workplace. These workers at least possess the economic rights that correspond to work performed within Spanish territory. By extension, if part of a Spanish undertaking operating in a third state and employing Spanish employees hired in Spain is transferred to a European Member State, according to Spanish law, Spanish acquired rights provisions appear to apply. Thus, Spain has not explicitly extended the application of its national acquired rights provisions to inbound transfers, but rather applies Spanish labour law to Spanish workers engaged in businesses operating abroad and belonging to Spanish undertakings. To summarize, inbound transfer scenarios are beyond the scope of the Acquired Rights Directive. As such, national acquired rights provisions do not apply to transfers of undertakings from a non-Member State to a Member State of the European Union. The Member States may, however, decide to extend the application of their national acquired rights provisions to include these types of transfers ensuring the preservation of employees rights upon a transfer of undertaking from a non-Member State to the Member State in question.

*2.6 Concluding remarks*

For the purposes of this research, a transfer of undertaking qualifies as being cross-border in nature when it is accompanied by a cross-border relocation of the undertaking, be it by acquisition, merger, outsourcing or other form of cross-border corporate restructuring involving a change in the person responsible for carrying on the business. As demonstrated above, in

[127] Real Decreto Legislativo 1/1995, de 24 de marzo, por el que se aprueba el texto refundido de la Ley del Estatuto de los Trabajadores (Vigente hasta el 01 de Enero de 2016).
[128] *Cf.* Hepple 1998, p. 5-6.

paragraph 2.1, a transfer of undertaking between a transferee and transferor that are merely located in different countries falls outside the scope of the present research since these transfers without relocation do not substantially differ from domestic transfers of undertakings. Thus, in effect, the present research discusses three types of cross-border transfer scenarios, two of which are captured by the Acquired Rights Directive and its national counterparts. The Acquired Rights Directive, due to its reliance on the location of the undertaking to be transferred, applies to intra-European transfers and outbound transfers alike. Conversely, inbound transfers are outside the scope of the Acquired Rights Directive. The Member States are however free to extend the scope of their national acquired rights directive to include these types of transfers. Regardless of the transfer scenario that is utilised, it is for the conflict of laws to decide which law applies to a cross-border transfer of undertaking. Since the Acquired Rights Directive, as is its nature, is not directly applicable to individual actors within the Member States, it befalls on the conflict of laws to determine which national acquired rights provisions apply in a given case, even in situations where the application of the Acquired Rights Directive is evident. As the next paragraph, and Chapters, will show, the directive itself may offer some assistance in this regard.

### 3. Cross-border application of Acquired Rights provisions

In applying the Acquired Rights Directive and its national counterparts it has, on occasion, been suggested that the Acquired Rights Directive or the national implementation provisions do not apply in cross-border situations.[129] This is a curious and erroneous assertion, since, as emphasized in the previous Chapter, the Acquired Rights Directive was originally established to counter the social problems arising from international mergers and concentrations arising from the creation of the Common Market.[130] To this end, the European Commission in its explanatory memorandum accompanying the initial 1974 proposal for a directive on the 'harmonisation of the legislation of Member States on the retention of the rights and

[129] Drobnig & Puttfarken 1989, p. 88; Loritz 1987, p.84; *Cf.* Feudner 1999, p. 1184; Deinert 2013, p. 11; Olbertz & Fahrig 2012, p. 2045.
[130] Also see Chapter 4, paragraph 2.

advantages of employees in the case of mergers, takeovers and amalgamations' noted that the protection of worker's rights is necessary whether the transfer of undertaking takes place 'within the territory of one Member State or the territories of several Member States'.[131] More so, the initial proposal for the Acquired Rights Directive was intended not only to cover transfers of undertakings carried out within and between the Member States, but also between the Member States and non-Member States.[132] In its proposal however, the Community recognized that it would be unable to impose Community legislation on non-Member States and as such appeared to opt against application of the Acquired Rights Directive to third countries:

> 'From the point of view of territorial application it appears necessary to protect the rights of workers whether the changes under consideration take place within the territory of one Member State or the territories of several Member States. For the same reasons it appears necessary to extend Community protection for workers to include changes which occur in undertakings situated within the territory of one or more Member States or one or more non-Member States. For legal reasons, however, it is not possible to impose the planned Community rules on non-member countries.'[133]

Still, according to Article 1 indent 2 of the 1974 proposal the directive was to apply to a transfer of undertaking 'irrespective of whether such merger or takeover is effected between undertakings in the territory of one or more Member States or it is effected between undertakings in the territory of Member States and undertakings in third countries.'[134] As such, the proposed directive was to apply whenever the transferor or transferee was situated within a European Member State.[135] The amended proposal of 1975 again demonstrates the Commission's awareness of the inability to impose

[131] Proposal for a directive of the Council 'harmonisation of the legislation of Member States on the retention of the rights and advantages of employees in the case of mergers, takeovers and amalgamations', COM (74) 351 Final/2, p. 5.
[132] Ghosheh & Gill 2002, p. 50.
[133] Proposal for a directive of the Council 'harmonisation of the legislation of Member States on the retention of the rights and advantages of employees in the case of mergers, takeovers and amalgamations', COM (74) 351 Final/2, p. 5.
[134] COM (74) 351 Final/2, p. 18.
[135] *Cf.* Hepple 1998, p. 5.

Community legislation on non-Member States. As such the explanatory memorandum shows that the directive is only to apply 'insofar as establishments or undertakings situated within the territory of the EEC are affected' by a transfer of undertaking.[136] As per Article 1(3) of the amended proposal the directive was to apply 'where and insofar as the transferring or dependent undertaking is situated in the territory of the Member States of the European Economic Community or the transfer or concentration affects an undertaking within that territory involved in such a transaction.'[137] Consequently, the amended proposal of 1975 proposed an even wider territorial scope than its predecessor, i.e. the proposal of 1974. The effects of the transfer within the European Community were to be the decisive factor in applying the directive.[138] As such, *the travaux préparatoires*, more specifically the initial drafts, of directive 77/187/EEC clearly show(s) that the directive is intended to apply in situations involving a cross-border transfer of undertaking. This application is even more evident from the conflict of laws provision included in the proposal of 1974. Article 10 of this proposal held a conflict of laws provision which undoubtedly ensured the application of the directive to cross-border transfers of undertakings.[139] The final directive however,[140] as well as the amending directive 98/50/EEC and consolidating directive 2001/23/EC, merely states that the directive is to apply whenever the undertaking to be transferred is situated within the European Community. Thus, whereas the initial proposals for the Acquired Rights Directive made clear that the directive was to be applied in cross-border situations, due to the insertion of (limited) conflict of laws provisions as well as an extended territorial scope, the present directive, i.e. directive 2001/23/EC, does not explicitly secure its application to cross-border transfers of undertakings nor does it differentiate between domestic and cross-border transfers.[141] More recent developments at a European level

[136] Amended proposal for a Council Directive on the harmonization of the legislation of Member States on the safeguarding of employees' right and advantages in the case of mergers, takeovers and amalgamations', COM (75) 429 final, p. 6.
[137] COM (75) 429 final, p. 17.
[138] Hepple 1998, p. 5.
[139] COM (74) 351 Final/2. The conflict of laws provisions were dropped from later versions of the directive because of the envisaged Draft Regulation on the Conflict of Laws in Employment Matters OJ 1972, C 49/26.. For more on this issue see Chapter 4.
[140] Directive 77/187/EEC.
[141] *Cf.* Hepple 1998, p. 4; Veldmaat & Van Assendelft de Coningh 2012, p. 52.

show that the European Commission does believe the Acquired Rights Directive to apply to cross-border transfers of undertakings. The Commission ordered a report on the consequences of cross-border transfers of undertakings, completed by *Hepple* in May 1998[142] and more recently a similar study was completed by the law firm CMS.[143] In 2007 the Commission launched a first phase consultation with a view to amending the Acquired Rights Directive in order to clarify its application to cross-border transfers of undertakings.[144] Since the social partners believed the existing instruments of Community and private international law to adequately deal with issues concerning cross-border transfers of undertakings, the Commission, in 2008, decided to abandon its efforts to revise the directive in this regard.[145] Nevertheless, the application of the Acquired Rights Directive to cross-border transfers of undertakings has not been disputed at a European level.

*3.1 Territorial scope of Article 1(2) Acquired Rights Directive*

The Acquired Rights Directive applies whenever the business to be transferred is located within EU territory prior to its transfer. Article 1(2) of the 2001 directive states that it 'shall apply where and in so far as the undertaking, business or part of the undertaking or business to be transferred is situated within the territorial scope of the Treaty'.[146] Thus, the application of the directive is entirely contingent on the geographical situation of the undertaking to be transferred. In order for the directive to apply, this undertaking or business needs to be situated within the territorial scope of

[142] Hepple 1998. This study was commissioned by the Directorate-General V, Employment, Industrial Relations and Social Affairs of the European Commission.

[143] CMS Employment Practice Area Group, Study on the application of Directive 2001/23/EC to cross border transfer of undertakings [2006] Study No VT/2005/101. This report is financed by and prepared for the use of the European Commission, Directorate-General for Employment Social Affairs and Equal Opportunities.

[144] First phase consultation of social partners under Article 138(2) of the EC Treaty concerning cross-border transfer of undertakings, businesses or parts of undertakings or businesses

[145] European Commission, Industrial Relations in Europe 2008, p. 135.

[146] The term Treaty refers to the consolidated version of the Treaty on the Functioning of the European Union, *OJ* 2010, C 83/47. At the time of its adoption the term Treaty in Art. 1(2) Directive 2001/23/EC referred to the Treaty establishing the European Community (consolidated version), *OJ* 2006 C, 321E.

the Treaty on European Union[147] and the Treaty on the Functioning of the European Union, as defined in Article 52 TEU and Article 355 TFEU.[148] As *Herren der Verträge*, the European Member States have the sole power to define the territory of the EU. As a rule of thumb, EU law governs the entire European territory of the Member States.[149] The Acquired Rights Directive consequently applies whenever the undertaking to be transferred is situated within the European territory of the Member States. According to the European Commission, the location of the economic entity to be transferred on the date of the transfer, regardless of whether the transferor and the transferee are governed by the laws of the same Member State, is the only relevant criterion for determining the territorial applicability of the Acquired Rights Directive.[150] Accordingly, transfers of undertakings from one Member State to another Member State as well as transfers from a Member State to a non-Member State are covered by the directive.[151] The wording of Article 1(2), which subjects the application of the directive to the geographical location of the undertaking 'to be transferred'[152] suggests that the present directive has a similar effect as the 1974 proposal, which applied to a transfer of undertaking 'irrespective of whether such merger or takeover

[147] The Treaty on European Union (consolidated version) OJ [2008] C115/13.

[148] With the entry into force of the Treaty of Lisbon, the territorial scope of the Treaties is defined by Article 355 TFEU. The directive additionally applies throughout the European Economic Area, see Article 68 of the Agreement on the European Economic Area, *OJ* [1994] L 1, p. 3, Annex XVIII, no. 32d.

[149] There are however some exceptions to this notion. For the special position of the overseas territories, i.e. the outermost regions and the overseas countries and territories see: Kochenov 2011; Kochenov 2009, p. 201; Case C-300/04 *M.G. Eman and O.B. Sevinger* v. *College van burgemeester en wethouders van Den Haag* [2006] ECR I-8055, ECLI:EU:C:2006:545.

[150] First phase consultation of social partners under Article 138(2) of the EC Treaty concerning cross-border transfers of undertakings, businesses or parts of undertakings or businesses, p. 1, available online at <http://ec.europa.eu/social/BlobServlet?docId=2442&langId=en>.

[151] *Cf.* Fetsch, 2002, p. 306; ETUC, 'The first phase consultation concerning cross border transfers of undertakings, businesses or parts of undertakings or businesses', SP 8/10/2007 [2007], available online at: <http://www.etuc.org/sites/www.etuc.org/files/ARD_ETUC_answer_final2007_1.pdf>; Niksova 2014, p. 61-62; Krebber 1998, p. 124; Krebber 1997, p. 322.

[152] *Cf.* CMS report 2006, p. 1, *Contra:* Francq 2007, p. 363 who believes that the 'directive applies only when the transferee is situated in a Member State' and that the situation 'where the transferee is localized in a third State and the transferor is localized in a Member State, does not fall into its scope of application.'

is effected between undertakings in the territory of one or more Member States or it is effected between undertakings in the territory of Member States and undertakings in third countries', since it applies whenever the undertaking or business to be transferred is located within EU territories, irrespective of the destination of the transferred undertaking.[153] To my mind, the wording of Article 1(2) is clear and unequivocal when it comes to the application of the directive to cross-border transfers of undertakings. It is apparent from Article 1(2), that, by seeking connection to the location of the undertaking to be transferred, the directive undisputedly applies to both intra-European and outbound transfer scenarios. This strokes with the aim of the directive, which is primarily to secure the rights and obligations of employees working in EU based undertakings upon the transfer of the undertaking in which they are employed. Since the employees cannot themselves assert any influence over the relocation of the undertaking of their employment and the destination of the undertaking after the transfer, the exclusion of outbound transfer scenarios is contrary to such aim. Employees that are employed by an undertaking that is transferred domestically or to another Member State are and should be equally entitled to the protection of their employment as employees that are employed by an undertaking that is transferred to a third country. Still, there appears to be some discussion as to whether the directive applies to the latter situation, which involves an outbound transfer, i.e. a transfer of undertaking to a non-Member State.[154]

The discussion of whether the Acquired Rights Directive applies to outbound transfer scenarios exists due to the absence of an express provision classifying cross-border transfers of undertakings as falling within the remit of the Acquired Rights Directive. For example, in its response to the Commission's first phase consultation, UAPME[155] expressed its desire for a clarification of the present scope of the directive with respect to cross-border transfers of undertakings, by stating:

[153] IDS 2011, p. 496; CMS report 2006, p. 1.
[154] Against such application: Niksova 2014, p. 57-61, 67, 68; UAPME 2007, p. 2; CMS report 2006, p. 68-69; Drobnig & Puttfarken 1989, p. 81, 88.
[155] Union Européene de l 'artisanat et des petites et moyennes entreprises.

> "The current definition of cross border transfers is relatively unclear. The Commission has the tendency to amalgamate the cross border transfer of undertakings within the European Union and outside of the EU. A more precise delimitation of the scope and definition of cross border
> transfer of undertakings would be desirable."[156]

To this end, the CMS Employment Practice Area Group in its study for the Commission, notes that the Acquired Rights Directive undoubtedly applies to a transfer from one Member State to another, but (in their belief) does not apply to a transfer to a non-Member State.[157] The present wording of Article 1(2) of the directive contradicts this view by subjecting the application of the directive to the location of the undertaking or business *to be* transferred. The CMS group therefore suggests an amendment of the Acquired Rights Directive by either adding the phrase 'provided that the undertaking is transferred within the territorial scope of the Treaty' or 'from one Member State to another' or, alternatively, by restricting the application of the directive to 'transfers within a particular Member State's territory'.[158] In the latter situation, which restricts the application of the Acquired Rights Directive to domestic transfers of undertakings, they believe that specific rules relating to cross-border transfers of undertakings should be drawn up. The reasoning underlying the view that the directive should not apply to outbound transfers, i.e. transfers out of the European Union, remains absent from the report, which is curious at best since the suggestion of such a fundamental change to the scope of the directive to my mind requires substantial justification. In general, the main reasons against the application of the Acquired Rights Directive in situations involving a transfer to a non-Member State lie in the inability to impose European legislation on non-Member States,[159] an assertion that shows little knowledge and understanding of private international law. Surely, the Member States are obliged to transpose the directive into their national legislation whereas that

[156] UAPME's reply to the first phase consultation concerning cross border transfers of undertakings, p. 1.
[157] CMS report 2006, p. 68.
[158] CMS report 2006, p. 69.
[159] Niksova 2014, p. 60; Teyssié 2010, p. 257; Haanappel – van der Burg 2015, p. 294; Haanappel- van der Burg 2016 I, p. 9.

obligation does not rest upon non-Member States. However, by reason of private international law Member State law, i.e. the national implementation provisions corresponding to the directive, may still be applied to e.g. third-state nationals, companies and those residing and domiciled in third states. The question of the enforcement of such law, which due to the absence of mutual trust and international enforcement treaties existing in relation to non-Member States may prove more difficult, should not be confused with the application of the law itself.

Those favouring the limitation of the application of the provisions stemming from the Acquired Rights Directive to domestic and intra-European transfers infer additional arguments from the reasons for establishing the Acquired Rights Directive which rely heavily on the harmonization of Member State legislation and the results of economic changes within the Common Market.[160] For instance, recital 2 of the Acquired Rights Directive states that 'economic trends are bringing in their wake, at both national and Community level, changes in the structure of undertakings, through transfers of undertakings, businesses or parts of undertakings or businesses to other employers as a result of legal transfers or mergers'.[161] By applying an extended interpretation of this recital, it is, on occasion, argued that the application of the directive is limited to transfers of undertakings within the Member States and from one Member State to another.[162] The same goes for recital 4 which emphasizes that 'differences still remain' in the Member States as regards the extent of protection of employees in this respect and these differences should be reduced. Thus, in this view, since the directive was originally established to promote the harmonisation of the relevant national laws ensuring the safeguarding of the rights of employees, the directive only applies to European Member States and as such should not be applied to the transfer of undertakings that are not within EU territory after the transfer.[163] To this end, it is sometimes argued that the wording '*where and in so far as'* in Article 1(2) of the Acquired Rights Directive requires the undertaking to be transferred to be located within 'the territorial scope of the

[160] Riesenhuber 2009, p. 409; Malmberg 2006, p. 389; Morvan 2004, p. 589; Kania 2012, 72-73.
[161] *Cf.* Riesenhuber 2009, p. 409.
[162] *Cf.* Malmberg 2006, p. 389; Morvan 2004, p. 589; Kania 2012, p. 72-73.
[163] *Cf.* Recital 6 Directive 2001/23/EC.

Treaty' both before and after the transfer.[164] In this sense, the words 'in so far as' are interpreted as 'as long as',[165] which to me resembles wishful thinking rather than an accurate interpretation of the wording. According to this view, the location of the undertaking to be transferred both before and after the transfer is decisive. The nationality or location of transferee and transferor are immaterial; the directive will apply regardless as long as the undertaking to be transferred is situated within EU territory both before and after the transfer. However, this view and interpretation of Article 1(2) of the Acquired Rights Directive are hardly convincing. Not only is this view incompatible with the etymology of the phrase, it is also at odds with the legislative history of the directive. The words 'in so far as' may well have been intended towards parts of businesses or undertakings, the transfer of which is expressly covered by the directive.[166] In this sense the words 'in so far as' in Article 1(2) could be interpreted as meaning that parts of businesses or undertakings are only covered by the directive if they are situated within the territory of the European Union.[167] Consequently, the transfer of parts of businesses or undertakings that are situated outside EU territory are outwith the scope of the Acquired Rights Directive, even if these parts of businesses or undertakings are part of a European based business or undertaking. This view is supported by earlier drafts of the directive. In commenting on the territorial scope of the 1974 proposal the Commission states that 'for legal reasons, however, it is not possible to impose the planned Community rules on non-member countries. In such cases, therefore, Article 1 provides for the application of this proposed directive only in so far as undertakings situated within the territory of the Common Market are involved. This can be of practical importance first and foremost when undertakings or establishments in non-Member States are incorporated in undertakings situated in the Community.'[168] Thus, it appears from legislative history that the words 'in so far as' in Article 1(2) of the Acquired Rights Directive[169] were primarily intended to exclude parts of

[164] Von Alvensleben 1992, p. 157; *Cf.* Niksova 2014, p. 59.
[165] Kania 2012, p. 74.
[166] See Article 1(1)(a) *et seq.* Acquired Rights Directive (Directive 2001/23/EC).
[167] This view is first portrayed by Kania: Kania 2012, p. 74.
[168] COM (74) 351 Final/2, p. 5; Kania 2012, p. 74-75.
[169] The words first appeared in Article 1(2) of Directive 77/187/EEC. The wording of this provisions has not changed since its inception in 1977..

businesses or undertakings located outside the Common Market, but part of EU based businesses or undertakings, from the scope of the directive. Conversely, parts of businesses or undertakings that are situated in the territory of the European Union and that are part of or incorporated in non-European based undertakings are covered by the provisions of the directive. As outlined above, this is in line with the primary aim of the directive which is to safeguard the rights of workers within the Common Market (upon a transfer of undertaking). To this end, its seems that employees that are employed by an undertaking that is transferred domestically or to another Member State are equally entitled to the protection of their employment as employees that are employed by an undertaking that is transferred to a third country. This is confirmed by the phraseology of Article 1(2) of the Acquired Rights Directive, which ensures that the directive applies whenever the undertaking to be transferred is situated within the territorial scope of the Treaty, i.e. within the Member States of the European Union. It does not require the undertaking to be transferred to be located within EU territory after the transfer. Since the application of the directive is limited to the geographical location of the undertaking *'to be transferred'* an extensive interpretation of the words 'where and in so far as', requiring the transferred undertaking to be situated within the EU territory after the transfer, is contrary to the meaning and wording of the directive.[170] The nationality or location of transferee and transferor as well as the location of the transferred undertaking after the transfer are of no consequence to the application of the Acquired Rights Directive. This view is shared by ETUC[171] which, in its response to the first phase consultation concerning cross border transfers of undertakings, businesses or parts of undertakings or businesses, emphasizes that 'Article 1.2 of the directive clearly extends the scope of the directive to transfers outside the EEA. The 'triggering' factor for the application of the Directive is the country where the transferor is situated.'[172] Thus, the only

[170] *Cf.* Hepple 2005, p. 175; ETUC, 'The first phase consultation concerning cross border transfers of undertakings, businesses or parts of undertakings or businesses', SP 8/10/2007 [2007], available online at:
<http://www.etuc.org/sites/www.etuc.org/files/ARD_ETUC_answer_final2007_1.pdf>;
Niksova 2014, p. 61-62; Krebber 1998, p. 124; Krebber 1997, p. 322; Fetsch 2002, p. 306.
[171] European Trade Union Confederation.
[172] ETUC, 'The first phase consultation concerning cross border transfers of undertakings, businesses or parts of undertakings or businesses', SP 8/10/2007 [2007], available online at:

requirement is that the undertaking is situated in a Member State prior to the transfer. In outbound transfer scenarios, the fact that the third state, i.e. the country of destination, does not possess any acquired rights provisions similar to those of the Acquired Rights Directive does not prevent the directive and its national counterparts from requiring application.[173]

In summary, the Acquired Rights Directive applies to cross-border transfers of undertakings even though the directive does not expressly secure its application to either domestic or cross-border matters. The directive, which was originally enacted in an effort to counter the problems arising from intra-Community mergers, takeovers and amalgamations aims 'to protect employees from losing acquired and future rights in the event of transfers of undertakings or amalgamations by introducing provisions affording protection and safeguards' [174] irrespective of whether such a transfer takes place within or across Member State borders. Even though the directive does not expressly provide that it applies to cross-border transfers of undertakings the wording of Article 1(2) is decisive in determining when the directive and, more so, its national counterparts are to be applied. In this, the directive determines its own territorial scope by stating that it applies 'where and in so far as the undertaking, business or part of the undertaking or business to be transferred is situated within the territorial scope of the Treaty.' Limiting the application of national acquired rights provisions to purely domestic transfers of undertakings would contradict the wording of Article 1(2) as well as the aims and rationale of the Acquired Rights Directive as would a limitation of their application solely to intra-European transfers of undertakings. The arguments supporting these views are of little validity and should be rejected in light of the aforementioned wording, aim and rationale of the directive, if for no other reason than upholding these views would seriously deprive those employed within EU territory from retaining their acquired rights upon a transfer of undertaking. By reason of

<http://www.etuc.org/sites/www.etuc.org/files/ARD_ETUC_answer_final2007_1.pdf>; *Cf.* Krebber 1997, p. 322; Fetsch 2002, p. 306.

[173] Niksova 2014, p. 62; Krebber 1998, p. 124; Thoelen 2015, No. 114, who states that the fact that the transferee is located outside the territoral scope is irrelevant, even though the enforcement of the provisions of the Directive may prove difficult those situations. Also see: Chapter 4.

[174] COM (75) 429 final, p. 3.

the wording of Article 1(2), the directive applies whenever the undertaking *to be transferred* is situated within the territory of a Member State. The application of the directive is thus dependent on the geographical location of the undertaking to be transferred. This means that the directive applies to transfers within and between Member States as well as to transfers from a Member State to a non-Member State, securing that workers employed within EU territory retain their employment rights upon a transfer of undertaking irrespective of whether that transfer occurs domestically or beyond Member State borders. However, the directive, as is its nature does not possess horizontal direct effect and is therefore not directly applicable to private individuals within the Member States. It is the Member States that are required to transpose the provisions of the directive into their national legislation thus ensuring the application of its provisions to employers and employees.

*3.2 Member State implementation*

As stated above, since the Acquired Rights Directive is addressed to the Member States,[175] they are required to transpose its provisions into their national legislation. As per Article 288 TFEU directives are binding upon each Member State to which they are addressed. It follows from this provision that the Member States are not necessarily required to achieve implementation via legislative action.[176] However, where a directive is intended to create rights for individuals the legal position arising from national implementation must be sufficiently precise and clear and the persons concerned must be fully aware of their rights and afforded the possibility of relying on them before the national courts.[177] In addition, the Member States must guarantee the application and effectiveness of the provisions of the directive by taking effective, proportionate and dissuasive penalty measures, analogous to those applicable to infringements of national

[175] Article 14 Directive 2001/23/EC. The Member States of the EU and the EEA are required to transpose the Directive into their national law.

[176] Case 29/84 *Commission of the European Communities v Federal Republic of Germany* [1985] ECR 1661, para. 23.

[177] Case 29/84 *Commission of the European Communities v Federal Republic of Germany* [1985] ECR 1661, para. 23.

law of a similar nature and importance.[178] Since a directive, such as the Acquired Rights Directive, is not equipped with horizontal direct effect, private individuals are unable to rely directly on the provisions of the directive against other individuals.[179] When a Member State has failed to (properly) transpose the provisions of a directive, individuals may rely on the doctrine of directive-compliant interpretation. This doctrine, developed by the European Court of Justice, requires national courts to interpret national law in light of the wording and purpose of the directive in order to achieve the result pursued by the directive.[180] However, such directive-compliant interpretation cannot go so far as to impose obligations on individuals in the absence of proper implementation in national law.[181]

Since the Member States are required to transpose the provisions of the directive into their national legislation such implementation requirement (also) extends to Article 1(2) of the Acquired Rights Directive. Although the Member States are not necessarily required to transpose the provisions of the directive via legislative action, transferee, transferor and the affected employees must be aware of their rights and should therefore know or be able to determine when a transfer of undertaking takes effect. As such, it is important to establish the territorial scope of the national provisions implementing the Acquired Rights Directive. The directive, in Article 1(2), merely states that the directive applies 'where and in so far as the undertaking, business or part of the undertaking or business to be transferred is situated within the territorial scope of the Treaty'. As such, it only states

[178] Case C-382/92, *Commission of the European Communities v United Kingdom of Great Britain and Nothern Ireland*, [1994] ECR I 2435, para. 55; this case involved the UK's failure to properly implement the (provisions of) the Acquired Rights Directive.

[179] Via the doctrine of direct effect private individuals are allowed to invoke the provisions of a directive against a State or a State body, provided that the provisions of the directive are unconditional and sufficiently precise and the state has failed to implement the directive in national law by the end of the period prescribed or where it fails to implement the directive correctly: Case 152/84 *M. H. Marshall v Southampton and South-West Hampshire Area Health Authority* [1986] ECR 723.

[180] Case 14/84 *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891, para. 26; Opinion of Advocate General Jacobs, Case C-456/98 *Centrosteel Srl v Adipol GmbH* [2000] ECR I 6019, para. 38.

[181] Cf. Opinion of Advocate General Jacobs, Case C-456/98 *Centrosteel Srl v Adipol GmbH* [2000] ECR I 6018, para. 35.

when it itself applies and remains silent on the territorial scope of the national implementation provisions. There are essentially two views on how Article 1(2) should be translated into national law: either the scope set forth in the directive is equally applied to national law or the provision requires national law to apply whenever the undertaking to be transferred is located within national territory.

According to the first view, the territorial scope of Article 1(2) forms a requirement for application of national legislation that is to be applied second to resolving the conflict of laws.[182] In this sense, Article 1(2) is interpreted as a rule without any direct conflict of laws implications.[183] According to this first view, the conflict of laws is to determine which national implementation measures are to be applied and as such takes precedence over the substantive provisions of the directive and national law, including Article 1(2).[184] As per the second view the territorial scope of the directive translates to the Member States applying their national acquired rights provisions whenever the undertaking to be transferred is situated within their distinct territory. If all Member States were to adhere to this view the combined national implementation measures of the Member States would ensure the application of the directive 'where and in so far as the undertaking, business or part of the undertaking or business to be transferred is situated within the territorial scope of the Treaty'. Regardless of which view should take precedence, the Member States have to take into account

[182] *Cf.* Kania 2012, p. 76-77.

[183] Niksova 2014, p. 68.

[184] By contrast, it is sometimes argued that Article 1(2) of the Directive should not be overrun by rules of private international law (See Krebber 1998, p. 124, 139 and 161, Niksova 2014, p. 62, 66, Fetsch 2002, p. 306). Thus, when the result of the conflict of laws reference conflicts with the territorial scope of the directive and as such with European law, the domestic conflict of laws should not be applied due to the primacy or supremacy of European law. Here it is argued that if, for instance a choice is made for subsuming the transfer of undertaking to the law that applies to the individual employment contract, a correction should be made where this law is not the law of a European Member State and as such does not conform to Article 1(2) of the Acquired Rights Directive. In this sense, Article 1(2) of the Acquired Rights Directive does appear to possess some conflict of laws implications, a view which is akin to the second view on the implementation of Article 1(2) into national legislation. For more on the conflict of laws and the proper conflict of laws approach in relation to transfers of undertakings see Chapter 4.

the scope of the directive in their implementation as well as in the interpretation of national acquired rights provisions.[185] The directive itself limits its application to the undertaking to be transferred being situated within EU territory and remains silent on the actual application of national acquired rights provisions. What is clear from Article 1(2) is that the laws of a Member State have to be applied whenever the undertaking to be transferred is situated within the territory of the European Union.[186] In other words, even though the directive does not expressly state when, in cross-border situations, the acquired rights provisions of a specific Member State shall apply, it does set forth that whenever the undertaking to be transferred is situated within EU territory, the directive and thus the national laws of a Member State should apply.[187] Although the directive seeks to ensure that the rights of employees are safeguarded upon the transfer of an undertaking that is situated within EU territory prior to the transfer it does not provide according to which national transposition measures the safeguarding of these rights is to be guaranteed. In this, it appears that the aim of Article 1(2) of the directive is to achieve the substantive result of the retention of employment rights throughout Europe rather than to solve issues of conflicting laws. Despite the various views and ideas on the relationship between Article 1(2) of the Acquired Rights Directive and the conflict of laws,[188] the Member States have to take into account the territorial scope contained in Article 1(2) in the implementation of the provisions of the directive as well as in the interpretation of existing national implementation measures. They therefore have to ensure that in cross-border transfer scenarios Member State acquired rights provisions are applied whenever the undertaking to be transferred is situated within EU territory upon or immediately prior to the transfer. The directive remains silent on the method by which this is to be secured.[189] The fact that the directive itself contains no

[185] Kania 2012, p. 77.

[186] Under this view, the directive is considered to contain an implicit preset for the conflict of laws. To this end, it has even been stated that Article 1(2) contains a Community conflict of laws provision (Cf. Kania 2012, p. 218; Schilling 2006, p. 56.

[187] Cf. Wimmer 1995, p. 207, 208; Niksova 2014, p. 67; Fetsch 2002, p. 307; *Cf.* Müller 2005, p. 396-397.

[188] For more on this see Chapter 4.

[189] On the basis of the principle of loyalty, enshrined in Article 4(3) TEU, although subordinate to Article 288 TFEU, the Member States should not only transpose the provisions of the directive but take all appropriate measures to ensure the fulfillment of the aims and

direct conflict of laws provisions leaves it to the private international law of the Member States to determine the law that applies to a given transfer of undertaking, an issue that is further addressed in Chapter 4. As such, even though this does not directly follow from the scope rule contained in Article 1(2) of the directive, the Member States are surely free to make the application of the national acquired rights provisions contingent on the transferred undertaking being located within their territory prior to the transfer as long as this does not conflict with Article 1(2).[190] Irrespective of the preferred territorial application of the Acquired Rights Directive, the Member States have not all transposed Article 1(2) of the directive in a similar manner. In fact, there are different approaches to the implementation of Article 1(2) throughout the Member States. The national transposition measures can generally be divided into three categories:

1. those whose legislation contains no express mention of its territorial application;
2. those that have explicitly limited the application of their national acquired rights provisions to undertakings to be transferred situated within their (own) territory and
3. those that have literally transposed Article 1(2) of the directive into national legislation.

*3.2.1 Group 1 – no express territorial application*

The majority of the European Member States are part of the first group, which includes five out of six of the founding Member States to the European Communities, i.e. the Netherlands, France, Germany, Italy and Belgium.[191] These Member States have either transposed the (larger part) of

obligations stemming from the Acquired Rights Directive. For detailed considerations on the principle of loyalty in EU law, see: Klamert 2014.

[190] The absence of any conflict of laws provisions in the directive itself and other international and Community private international law instruments (In my belief a transfer of undertaking and the provisions corresponding to those of the Acquired Rights Directive are outwith the scope of the Rome I Regulation and the Rome Convention as a transfer of undertaking occurs by operation of law rather than being contractual in nature) means that the determination of the law that applies to a cross-border transfer of undertaking befalls the (domestic) private international law of the Member States.

[191] In addition Austria, Bulgaria, Croatia, Cyprus, Estonia, Finland, Hungary, Ireland, Poland, Portugal, Spain, Slovenia, Sweden. Spain partly belongs to this group as it, in Art. 1(4)

the directive into their civil codes or labour codes or have issued a separate law pertaining to the transfer of undertakings. Although the perceived territorial scope of the national implementation provisions of the Member States in the first group may vary, the common denominator lies in the absence of any express provisions regarding the territorial scope of national acquired rights provisions. In other words, the members of the first group have conjointly failed to expressly implement Article 1(2) of the Acquired Rights Directive into their national legislation.

The members of the first group are required to apply the so-called directive-compliant interpretation by reason of the lack of an express provision regarding the territorial scope of their national acquired rights provisions. As mentioned above, the Member States are free not to achieve implementation via legislative action. However, where they choose to do so, transferee, transferor and the affected employees must be able to easily determine when a transfer of undertaking occurs in order to determine their legal position. After all, the application of the national acquired rights provisions is not spontaneously limited to any distinct territory. Thus, the Member States of the first group have to actively ensure that Article 1(2) of the Acquired Rights Directive is properly applied and transposed. In any event, they will have to ensure, possibly via directive-compliant interpretation, that a Member State's national acquired rights provisions are applied whenever the undertaking to be transferred is situated within EU territory prior to the transfer. If their acquired rights provisions are not naturally applied in the aforementioned event, the Member States and national courts will have to apply directive-compliant interpretation to ensure compliance with the Acquired Rights Directive. Thus, for example, in the so-called *Amerikanische Piloten*-case[192] in which the German *Bundesarbeitsgericht* famously ruled against the application of §613a BGB as overriding mandatory rule, the German acquired rights provisions should have been applied irrespective of the affected employees' employment contract being subject to the laws of New York. The case involved the transfer of a Berlin

Estatuto de los Trabajadores extends the application of Spanish labour law to Spanish workers hired in Spain and engaged abroad by undertakings belonging to Spanish businesses. No additional mention of the territorial scope of Spanish acquired rights provisions is made.

[192] BAG 29 October 1992 – 2 AZR 267/92.

based aviation business, involved in domestic German air travel, from Pan American World Airways to Berliner Lufthansa Airport. In this case, the *BAG*[193] concluded that neither §613a BGB nor the national acquired rights provisions of another Member State were applicable, even though the undertaking transferred was situated in Germany both before and after the transfer.[194] The ruling in this case abundantly conflicts with Article 1(2) of the Acquired Rights Directive, according to which the national acquired rights provisions of a Member State should always apply whenever the undertaking to be transferred is situated in EU territory. Therefore the *BAG* should have utilized a directive-compliant interpretation ensuring the application of Article §613a BGB, irrespective of the employment contract being governed by the laws of the State of New York both by reason of choice of law and as applicable law in the absence of choice (due to the law of the habitual place of employment being set aside by reason of the circumstances of the case making the contract more closely connected with the State of New York). Surely, the result of the conflict of laws reference (in this case connection is sought to the employment contract) should not be able to set aside the mandatory provisions arising from the Acquired Rights Directive. *A fortiori*, Article 1(2) of the Acquired Rights Directive holds an inherent conflict of laws implication that national acquired rights provisions are to apply whenever the undertaking *to be transferred* is situated within the territory of a Member State. As a result, national transposition measures should undoubtedly ensure the application of the laws of a Member State whenever the undertaking to be transferred is situated within the territory of the European Union. Where national implementation measures fail to do so, a conflict with Community law, i.e. Article 1(2) of the Acquired Rights Directive, arises.[195] This failure to properly implement the directive may be remedied first by legislative action and second by directive-compliant interpretation. In any event, where, upon the transfer of an EU based undertaking, application of Member State acquired rights provisions is not

[193] This conclusion was based on Articles 30 and 34 EGBGB (the German provisions transposing Articles 6 and 7 of the Rome Convention 1980).
[194] BAG 29 October1992 – 2 AZR 267/92.
[195] Krebber 1998, p. 140; Fetsch 2002, p. 307.

guaranteed, a correction of the result of the conflict of laws reference should come to pass.[196]

*3.2.2 Group 2 – limitation to national territory*

Luxembourg, Malta, the United Kingdom and Romania[197] belong to the second category and have limited the application of their national acquired rights provisions to their own territory. According to Article 3(1)(a) of the Transfer of Undertakings (Protection of Employment) Regulations 2006[198] the United Kingdom's acquired rights provisions, commonly known as TUPE, apply to 'a transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity.' This provision does not limit the application of TUPE to employees ordinarily employed in the United Kingdom. It is the location of the business or undertaking to be transferred that is decisive, not the place of employment of the employees engaged by that business or undertaking. 'For example, if there is a transfer of a UK exporting business, the fact that the sales force spends the majority of its working week outside the UK will not prevent the Regulations applying to the transfer, so long as the undertaking itself (comprising, amongst other things, premises, assets, fixtures & fittings, goodwill as well as employees) is situated in the UK.'[199] Article L127-1(2) of the Luxembourg Code de Travail contains a provision similar to that of the United Kingdom, which

[196] Such correction mechanisms can generally be found in the doctrines of public policy and overriding mandatory rules. For more on this and the relation of these mechanisms to the transfer of undertakings see Chapter 4, paragraph 6.

[197] Art. 2 Law No. 67/2006, which states that the law applies to the transfer of undertakings, businesses or parts of undertakings or businesses located within Romanian territory; Olteanu & Kühl 2007, p. 295.

[198] As amended by the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014.

[199] This example is provided by the UK's Department for Business Innovation and Skills upon the review and amendment of TUPE 2006: BIS, 'Employment Rights on the Transfer of an Undertaking. A guide to the 2006 TUPE Regulations (as amended by the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014) for employees, employers and representatives', London: January 2014, p. 13, available online at :
<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/275252/bis-14-502-employment-rights-on-the-transfer-of-an-undertaking.pdf> .

reads: '*Le présent chapitre s'applique chaque fois que l'entreprise, l'établissement ou la partie d'entreprise ou d'établissement à transférer se situe sur le territoire national du Grand-Duché de Luxembourg*.' Likewise, Article Article 3(1)(d) of the Maltese Transfer of Business (Protection of Employment) Regulations limits the application of the Maltese acquired rights provisions to the undertaking to be transferred being situated in Malta.[200] Article 2 of Law No. 67/2006 confines the application of the Romanian acquired rights provisions to transfers of undertakings, businesses or parts thereof located in Romania, which may suggests a slightly wider territorial scope than the provisions in force in the United Kingdom, Malta and Luxembourg.[201]

The members of the second group have limited the application of their national acquired rights provisions to the undertaking being transferred being situated within their territory. As a result, it has on occasion been stated that these Member States fail to comply with Article 1(2) of the Acquired Rights Directive by not equating the scope of national acquired rights provisions to that of the Acquired Rights Directive.[202] However, Article 1(2) of the Acquired Rights Directive clearly states that the provisions of the directive 'shall apply where and in so far as the undertaking, business or part of the undertaking or business to be transferred is situated within the territorial

[200] Article 3(1) of the Transfer of Business (Protection of Employment) Regulations reads: 'where and in so far as the undertaking, business or part of the undertaking or business to be transferred is situated in Malta.'

[201] Article 2 Law No. 67/2006 reads: '*Prevederile prezentei legi se aplică transferului de întreprinderi, unităţi sau părţi aacestora situate pe teritoriul României, indiferent de natura capitalului social.'* A literal reading of this provisions suggests that the Romanian acquired rights provisions are broader, or even narrower, in scope than the provisions existing in Luxembourg, Malta and the United Kingdom, since the Romanian legislator has limited the application of the Romanian acquired rights provisions, not merely to the undertaking to be transferred being situated in Romania, but to undertakings, businesses or parts thereof located in Romania. Unclear is whether Romanian legislation therefore also covers transfers of undertakings that are situated in Romania after the transfer (which would suggest a wider scope) or requires the transferred undertaking to be located in Romania both before and after the transfer (which would suggest a narrower scope).

[202] McMullen 2005, p. 298; Laagland 2011, p. 19, who commenting on the acquired rights provisions of the UK suggests that TUPE applies whenever the transferred undertaking is situated in the United Kingdom, while surely meaning that the undertaking *to be transferred* has to be situated within the United Kingdom for TUPE to apply.

scope of the Treaty'. This territorial scope could surely translate to the Member States applying their national acquired rights provisions where and insofar as the undertaking, business or part of the undertaking or business to be transferred is situated within their territory. As stated above, the 'territorial scope of the Treaty' mainly comprises the combined European territory of the EU Member States and as such, the territory of the European Union forms the sum of its constituent parts. Thus, if each Member State were to apply its national acquired rights provisions whenever the undertaking to be transferred is located within its territory, the combined application of the national acquired rights provisions of the European Member States will comprise the territorial scope of the Acquired Rights Directive itself. In other words, the proper application of Article 1(2) of the Acquired Rights Directive is ensured by the European Member States limiting the application of their national acquired rights provisions to the undertaking being transferred being located within their territory. Surely, the individual European Member States are unable to apply their national legislation outside their national borders, save for the situations where the conflict of laws, in international situations, points to the application of their law(s), to the same extent as the European Union is unable to impose Community legislation on non-Member States. Limiting the application of national acquired rights provisions to the undertaking to be transferred being located within the territory of the Member State in question will certainly result in the protection of employees involved in outbound transfers only, i.e. transfers from the Member State in question to another state. Building on the example of the United Kingdom, this means that a business transfer from the United Kingdom to a country outside the United Kingdom, whether an EU Member State or a third country will result in the application of the TUPE Regulations. In the reverse situation, involving an inbound transfer, i.e. where the business being transferred is transferred to the UK, the provisions of TUPE will not protect the affected employees.[203] This situation is not irreconcilable with Article 1(2) of the Acquired Rights Directive since in the event of an inbound transfer under which a business or undertaking is transferred from a Member State to the United Kingdom, the national acquired rights provisions of the Member State of origin could apply, resulting in compliance with the Acquired Rights Directive. In summary,

[203] McMullen 2005, p. 298-299.

although the territorial scope contained in Article 1(2) of the Acquired Rights Directive does not require the Member States to limit the application of their national implementation measures whenever the undertaking, business or part of an undertaking of business *to be transferred* is located within their territory, it neither precludes the Member States from doing so. As such, the national acquired rights provisions may take the form of a unilateral scope rule in the sense that the application of the national acquired rights provisions is dependent on the geographical location of the undertaking within the Member State concerned. Thus, in the example of the United Kingdom, its acquired rights provisions, which apply to a transfer of an undertaking situated immediately before the transfer in the United Kingdom, remain unapplied when, for example, a Dutch undertaking, situated in the Netherlands, is transferred from a Dutch transferor to an English transferee coupled with a simultaneous relocation to the United Kingdom. Article 3(1)(a) of the UK's TUPE Regulations unilaterally sets forth when the Regulations themselves apply and remains silent on the application of foreign law. If the law applicable to such a transfer, from the Netherlands to the United Kingdom, is to be determined by the English court, it will have to decide, on the basis of its own rules of private international law, which law applies to the transfer of undertaking. It is unclear which law, according to English private international law, applies to a transfer of undertaking in the absence of the TUPE regulations being applicable. What is clear however, that in these circumstances the undertaking to be transferred is situated within Member State territory prior to the transfer, thus requiring the application of the laws of a Member State, i.e. national implementation measures corresponding to the provisions of the directive. In the aforementioned example, Article 1(2) does not require the UK to apply its own implementation measures, rather Article 1(2) requires the application of Member State implementation measures irrespective of the method through which this is achieved. Thus, the provisions of the Member States of the second group, which have limited the application of national law to the undertaking to be transferred being situated within national territory is not incompatible with the directive as long as Member State acquired rights provisions are applied whenever the undertaking to be transferred is situated within EU territory.[204]

[204] *Cf.* Article 1(2) Acquired Rights Directive.

*3.2.3 Group 3 – no limitation to national territory*

The third group consists of Denmark[205] and Greece. These countries have (almost literally) transposed Article 1(2) of the Acquired Rights Directive into their national legislation. According to Danish law the Danish law transposing the provisions of the Acquired Rights Directive applies to the transfer of a business or part thereof whenever it is situated within the area to which the Treaty establishing the European Economic Area is applied. Greece, in Article 2(2) of Presidential Decree 178/2002,[206] has literally transposed Article 1(2) of the Acquired Rights Directive by providing: 'This decree shall apply where and in so far as the undertaking, business or part of the undertaking or business to be transferred is situated within the territorial scope of the Treaty.'

As mentioned above, the third group, consisting of Denmark and Greece, limits the application of their national acquired rights provisions to the undertaking to be transferred being situated within the territorial scope of the Treaty[207] or to the transfer of an undertaking whenever it is situated within the area to which the Treaty establishing the European Economic Area is applied.[208] By doing so, the members of the third group, in all appearances, comply with the Acquired Rights Directive and Article 1(2) contained therein. When compared to the implementation measures undertaken by the members of the second group, the application of Danish and Greek acquired rights provisions appears broader in nature. If a literal application of the scope rule in Article 1(2) is utilised to apply national legislation, which is the case in Greece, national acquired rights provisions will be applied whenever the undertaking to be transferred is situated within EU territory and the case falls within the jurisdiction of the courts of the Member State concerned. Thus, if Greek courts were to rule on a transfer of undertaking, Presidential Decree 178/2002 could apply even in situations where the undertaking to be

[205] As per §1 of the Danish Virksomhedsoverdragelsesloven: *' Loven finder anvendelse ved overdragelse af en virksomhed eller en del heraf, der ligger inden for det område, hvor traktaten om oprettelse af Det europæiske økonomiske Fællesskab finder anvendelse.'*

[206] *΄Το παρόν διάταγμα εφαρμόζεται όταν και εφόσον η μεταβιβαστέα επιχείρηση, ή εγκατάσταση ή το τμήμα επιχείρησης ή εγκατάστασης βρίσκεται στο πεδίο εδαφικής εφαρμογής της συνθήκης.΄*

[207] Greece.

[208] Denmark.

transferred is not situated within Greek territory immediately prior to the transfer, for instance in situations where the Greek courts have obtained jurisdiction on the basis of the domicile of the employee or that of the transferee.[209] A literal interpretation of the Danish transposition of Article 1(2) suggests an even wider scope since it applies to the transfer of an undertaking whenever it is situated within the area to which the Treaty establishing the European Economic Area applies. Since §1 of the Danish *Virksomhedsoverdragelsesloven* does not limit the application of Danish law to the geographical location of the undertaking to be transferred, it appears that Danish acquired rights provisions might also apply to the transfer of undertakings that are situated within the area to which the Treaty establishing the European Economic Area applies after the transfer. As such, inbound transfers, i.e. transfers from a non-Member State to a Member State of the European Union or the European Economic Area might also become covered by the Danish acquired rights provisions. Utilising an extended territorial scope by applying national acquired rights provisions to transfers of undertakings from non-Member States to European Member States is surely permitted by the directive, which in Article 8 allows the Member States to 'to apply or introduce laws, regulations or administrative provisions which are more favourable to employees'. Nonetheless, the differences in the (perceived) territorial scope of national acquired rights provisions may result in different national laws applying in different Member States. This, to some extent, negates the primary purpose of the Acquired Rights Directive which is to harmonise the laws of the Member States in order to safeguard the rights of employees upon a transfer of undertaking.

### *3.3 Concluding remarks*

The primary purpose of this paragraph has been to determine whether the Acquired Rights Directive and the national provisions transposing the

[209] This may not be a problem in situations involving the minimum protection afforded by the directive. After all, the directive seeks to ensure a minimum level of employment protection throughout the European Union. In order to achieve the application of such minimum standards it may not matter through which national implementation measures the minimum level of employment protection is secured. If becomes difficult however in situations where the laws of the Member States exceed the minimum protection offered by the directive. As such, where a Member State offers more or additional protection it becomes important to establish which Member State provisions are to apply in a given case.

directive apply in situations surpassing national borders. Although the applicability of the Acquired Rights Directive and its national counterparts to cross-border transfers of undertakings has been debated at times it is now widely accepted that the directive and national acquired rights provisions apply in cross-border situations. The notion that these provisions are limited to domestic situations by reason of the territorial application of domestic law or because of the practical difficulties arising from a cross-border transfer of undertaking, has been defeated. By virtue of an express scope rule in Article 1(2) the Acquired Rights Directive applies 'where and in so far as the undertaking, business or part of the undertaking or business to be transferred is situated within the territorial scope of the Treaty'. This means that the location of the undertaking *to be transferred* is decisive in determining when the directive and its national counterparts apply. What is clear from the wording of the directive is that it applies to transfers from one European Member State to another as well as transfers from a European Member State to a non-Member State. As such, the directive ensures that the rights of employees employed by an undertaking based in the EU are safeguarded whenever there is a change in the person of their employer by reason of a transfer of undertaking, irrespective of whether the undertaking is transferred to a foreign or domestic transferee or is coupled with a simultaneous relocation abroad. Although, the case law on cross-border transfers of undertakings is limited, the cross-border application of national acquired rights provisions has been confirmed by the jurisprudence of several Member States. Cross-border transfers of undertakings have, for example, been established in cases involving a transfer from e.g. the Netherlands to Belgium,[210] Germany[211] and France[212]; from Germany to France,[213] Ireland[214] and Switzerland[215] and from the United Kingdom to Isreal.[216]

[210] Rb. Den Haag 26 August 2016, ECLI:NL:RBDHA:2016:9988; Ktr. Eindhoven 9 September 2008, *JAR* 2008/271.
[211] Hof 's Hertogenbosch 6 September 2016, ECLI:NL:GHSHE:2016:4043.
[212] Ktr. Zaandam (Vzr.) 26 July 2007, *JAR* 2008/67.
[213] Cass. soc. 28 March 2006 n°03-43995; Cass. soc. 13 April 1999 *RJS* 1999, n°794 ; BAG 20 April 1989 – 2 AZR 431/88.
[214] LAG Hamburg, 22 May 2003 – 8 Sa 29/03, BeckRS 2003 30459179.
[215] BAG 26 May 2011 8 AZR 37/10; LAG Baden-Württemberg 15 December 2009 22 Sa 45/09; ArbG Freiburg 13 March 2009 14 Ca 515/08.
[216] *Holis Metal Industries Limited* v. *(1) GMB (2) Newell Limited* [2008] IRLR 187, Appeal No. UKEAT/0171/07/CEA.

Whereas cross-border transfers of undertakings undisputedly fall within the remit of the Acquired Rights Directive and its national counterparts, the territorial application of national acquired rights provisions appears to differ among the Member States. In this, three modes of implementation can be distinguished: no express implementation, translation to national territory and literal implementation. Although either of these implementation measures could, if applied uniformly, in principle, fulfill the territorial scope of the Acquired Rights Directive, the existence of different approaches throughout the Member States is likely to result in issues of conflicting laws. After all, the differences in the (perceived) territorial scope of national acquired rights provisions may result in different national laws applying in different Member States, negating, to some extent, the harmonizing efforts of the Acquired Rights Directive.

## 4. Additional definitions

Since the Acquired Rights Directive seeks to protect the employees affected by a transfer of undertaking, it is important to establish who qualifies as an employee under the directive, in other words it is important to confirm the application *ratione personae* of the Acquired Rights Directive. On the basis of Article 2(1)(d) Acquired Rights Directive an employee means 'any person who, in the Member State concerned, is protected as an employee under national employment law'. This provision, which forms a codification of the ECJ's flagship case in *Danmols Inventar,*[217] leaves the personal scope of the directive to be resolved by the national laws of the Member States. As such, despite a communitaurised definition of worker existing under the rights on free movement of workers,[218] the notion of employee under the Acquired Rights Directive is to be defined by the Member States themselves.[219] This is underlined by Article 2(2) Acquired Rights Directive which clarifies that the directive will not prejudice national law where it concerns the definition of employment contract or relationship. In *Danmols Inventar*, after considering that the Acquired Rights Directive only intends to effectuate partial

[217] Case 105/84 *Foreningen af Arbejdsledere i Danmark v A/S Danmols Inventar* [1985] ECR 2639, ECLI:EU:C:1985:331.

[218] *Cf.* Article 45 TEU.

[219] This view is opposed by Amandine Garde, who believes that the comminitaurised definition of workers under Art. 39 EC Treaty (now Art. 45 TEU) should equally apply within the Acquired Rights Directive: Garde 2004, p. 188.

harmonisation and that it does not aim to establish a uniform Community level of protection on the basis of common criteria, the Court held:

> 'It follows that the directive may be relied upon only by persons who are, in one way or another, protected as employees under the laws of the Member State concerned.'[220]

As a result, employees are those who are protected as such under the laws of the Member State concerned. Although this phraseology may appear broad in the sense that the directive applies to all those who *in one way or another* are protected as employees, the actual protection of employees is fully dependent on national law, with the sole reservation that Member States are not allowed to exclude employment contracts or relationships solely because of the number of working hours performed, the duration of the contract or the fact that it concerns temporary employment relationships within the meaning of Article 1(2) of Directive 91/383/EEC.[221] Leaving the concept of employee to be defined by national law may seem undesirable in light of the differences in national application of acquired rights provisions that will inevitably arise as a result.[222] In cross-border transfer scenarios, the differences in employee definitions may therefore result in issues of conflicting laws, e.g. by the laws in force at the country of origin protecting a certain employee, who is deprived of any protection under the laws in force at the country of destination and *vice versa*. A uniform level of employment protection throughout the European Union effectuated by establishing a broad communitaurised definition of the notion of employee should therefore be preferred, especially in light of the Community definition existing for other concepts within the Acquired Rights Directive, such as 'legal transfer'[223] and 'undertaking'.[224]

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[220] C-105/84 *Foreningen af Arbejdsledere i Danmark v A/S Danmols Inventar* [1985] ECR 331, ECLI:EU:C:1985:331., para. 27-28.

[221] Article 2(2) (a), (b) and (c) Acquired Rights Directive (Directive 2001/23/EC)

[222] *Cf.* e.g. Garde 2004, p. 188; Micklitz 2015, no. 132, 133.

[223] *Joined Cases C-232/04 and C-233/04 Securicor [2005] ECR I-11237, ECLI:EU:C:2005:778*; *Case 324/86 Foreningen af Arbejdsledere i Danmark v Daddy's Dance Hall A/S [1988] ECR 739, EU:C:1988:72.*

[224] Case 24/85 *Spijkers v Benedik* [1986] *ECR* 1119, ECLI:EU:C:1986:127; Case C-13/95 *Ayse Süzen v Zehnacker Gebäudereinigung GmbH Krankenhausservice* [1997] ECR-I 1259, ECLI:EU:C:1997:141.
Case C-466/07 *Dietmar Klarenberg v. Ferrotron Technologies GmbH* [2009] ECR I-803; Case C-160/14 *Ferreira da Silva e Brito & others v Estado Português* [2015]

**5. Retention of identity**

As clarified in the previous Chapter, the Acquired Rights Directive and its national counterparts apply whenever the 'transfer of an undertaking, business, or part of an undertaking or business to another employer as a result of a legal transfer or merger' occurs.[225] In order for the provisions of the directive to apply there needs to be a transfer of an 'economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary'.[226] The European Court of Justice has set forth an ever-growing, hitherto insufficiently clear,[227] set of guidelines to help determine whether an *undertaking* has been transferred.[228] In this, the deciding factor is whether the business was disposed of as a going concern, indicated by the resumption or continuation of its operation(s) (with the same or similar activities) by the new employer, described as the retention of identity. In its seminal case, *Spijkers,* the ECJ established that 'the decisive criterion for establishing whether there is a transfer of undertaking for the purposes of the directive is whether the business in question retains its identity'.[229] In the event of a transfer of undertaking that takes place across national borders, specifically where it concerns a transfer of undertaking that involves a cross-border relocation of the undertaking to be transferred, the question may arise as to whether that undertaking retains its identity. More so, it may be questioned whether it is possible for an entity to retain its identity once it moves from one country to another.[230] To this end, it has been argued that a change in legal, economic and social environment due to

ECLI:EU:C:2015:565; Case C-509/14 *Administrador de Infraestructuras Ferroviarias (ADIF) v Luis Aira Pascual* [2016] ECLI:EU:C:2015:781.

[225] Art. 1(a) Acquired Rights Directive (Directive 2001/23/EC).

[226] Art. 1(b) Acquired Rights Directive (Directive 2001/23/EC); this definition was first included in the 1998 Acquired Rights Directive and is intended to codify the case law of the European Court of Justice with regard to the definition of the term 'undertaking'.

[227] *Cf.* Beltzer 2009, p. 9-10; Riesenhuber 2009, p. 420.

[228] What constitutes an ' undertaking' or a ' transfer' in cross-border transfer situations does differ from domestic situations. For a more detailed overview of these concepts see the previous Chapter.

[229] Case 24/85 *Spijkers v Benedik* [1986] *ECR* 1119.

[230] CMS report 2006, p. 17; *Holis* UKEAT/0171/07/CEA, p. 7; Veldmaat & van Assendelft de Coningh 2012, p. 23; Raif & Ginal 2013, p. 218; Deinert 2013, p. 342; Olbertz & Fahrig 2012, p. 2046-2047.

a relocation abroad may result in the loss of identity of the transferred undertaking.[231] Whether there is any truth to this assertion has to be established on the basis of several criteria, established by the ECJ in *Spijkers*, that determine whether an undertaking has been transferred. These factors apply in domestic and cross-border situations alike.[232] In effect, the national court has to take into account all the circumstances that characterise the undertaking in question such as (a) the type of undertaking or business, (b) the transfer of tangible assets, (c) the value of intangible assets, (d) the transfer of the majority of the employees, (e) the transfer of customers as well as (f) the degree of similarity between the activities carried on before and after the transfer and (g) the period, if any, for which the activities were suspended. All of these circumstances are single factors in an overall assessment and cannot be considered in isolation.[233] The absence of any one factor does not preclude a transfer from taking place. Thus, it is for the national court to take these factors into account in its overall assessment of whether a transfer of undertaking under the directive and its national counterparts has taken place.

*5.1 Type of undertaking or business*

As briefly outlined above, the type of undertaking to be transferred is one of the criteria of importance in determining whether a transfer of undertaking has transpired. Although all *Spijkers* factors are single factors in the overall consideration, the weight attributed to these factors may differ depending on the branch in which the undertaking to be transferred operates.[234] As such, type of undertaking transferred bares weight on the other criteria to be considered in the overall assessment of whether a transfer of undertaking has

[231] CMS report 2006, p. 17; Veldmaat & van Assendelft de Coningh 2012, p. 23. Both base this assumption on a decision by the French Cour de Cassation [Cass. soc., 5 April 1995, n° 93-42.690]. However, in this decision the *Cour* does not specifically mention the loss of identity due to legal, economical and social changes; it merely states that employment has been cancelled due to a transfer of activities abroad and a change in environment.

[232] See *e.g.* Feudner 1999, p. 1188; Kania 2012, p. 36 *et seq.*; Raif & Ginal 2013, p. 218; Reiner 2010, p. 123.

[233] Case 24/85 *Spijkers v Benedik* [1986] *ECR* 1119, para. 13.

[234] *Cf.* Beltzer 2005, p. 52, who considers some factors, such as the type of undertaking being transferred 'more equal than others'; *Cf.* Haanappel-van der Burg 2015, para. 6.2.2, who believes that Dutch courts attribute to much weight to the factor of the type of undertaking by continuously distinguishing between asset-reliant and labour-intensive undertakings, p. 168.

occurred.[235] According to the ECJ 'It follows that the degree of importance to be attached to each criterion indicating a transfer within the meaning of Directive 2001/23 will necessarily vary according to the activity carried on, or indeed the production or operating methods employed in the relevant undertaking, business or part of a business'.[236] A distinction may therefore be made between asset-reliant and labour-intensive undertakings.[237] Where it involves an undertaking that is mostly asset-reliant the transfer of tangible and intangible assets, such as buildings, production machinery, tools, raw materials, finished and semi-finished products and transport equipment, is a predominant factor in determining whether a transfer of undertaking has occurred.[238] In other types of undertakings however, such as businesses involved in the services sector and other labour-intensive sectors the workforce is of primary concern.[239] Thus the type of undertaking being transferred, indicated by the activity carried on or the production or operating methods, forms a key factor in determining when the transferred undertaking retains its identity and in ascertaining which of the *Spijkers*-factors forms a key component in the overall assessment. In this, it is

[235] *Cf.* Franzen 2008, p. 140; Beltzer 2005, p. 52; Haanappel-van der Burg 2016 II, p. 81.

[236] Joined cases C-232/04 and C-233/04 *Güney-Görres and Others* [2005] ECR I-11255, ECLI:EU:C:2005:778,para. 35; Case C-13/95 *Ayse Süzen v Zehnacker Gebäudereinigung GmbH Krankenhausservice* [1997] ECR-I 1259, ECLI:EU:C:1997:141, para. 18; Joined cases C-173/96 and C-247/96 *Hidalgo and Others* [1998] ECR I-8237, ECLI:EU:C:1998:595, para. 31.

[237] Joined cases C-232/04 and C-233/04 Güney-Görres and Others [2005] ECR I-11255, ECLI:EU:C:2005:778, para. 35; Case C-13/95 *Ayse Süzen v Zehnacker Gebäudereinigung GmbH Krankenhausservice* [1997] ECR-I 1259, ECLI:EU:C:1997:141, para. 18; Joined cases C-173/96 and C-247/96 *Hidalgo and Others* [1998] ECR I-8237, ECLI:EU:C:1998:595, para. 31; Case C-466/07 *Dietmar Klarenberg v Ferrotron Technologies GmbH* [2009] ECR I-803, ECLI:EU:C:2009:85; Case C-160/14 *Ferreira da Silva e Brito & others v Estado* Português [2015] ECLI:EU:C:2015:565; Case C-509/14 *Administrador de Infraestructuras Ferroviarias (ADIF) v Luis Aira Pascual* [2016] ECLI:EU:C:2015:781.

[238] Gussen, BeckOK BGB § 613a, 2015, no. 19 ; Preis, Erfurter Kommentar zum Arbeitsrecht 2015, § 613a, no. 13; BAG 14 July 1994 2 AZR 55/94 *NZA* 1995, 27; BAG 16 May 2007 8 AZR 693/06, *NZA* 2007, 1296.

[239] Case C-13/95 *Ayse Süzen v Zehnacker Gebäudereinigung GmbH Krankenhausservice* [1997] ECR-I 1259, ECLI:EU:C:1997:141, para. 21; Joined cases C-127/96, C-229/96 and C-74/97 *Hernández Vidal* [1998] ECR I-8179, ECLI:EU:C:1998:594, para. 32; Joined cases C-173/96 and C-247/96 *Hidalgo and Others* [1998] ECR I-8237, ECLI:EU:C:1998:595, para 32; Case C-172/99, *Oy Liikenne* [2001] ECR I-761, ECLI:EU:C:2001:59, para. 38; Gussen, BeckOK BGB § 613a, 2015, no. 20.

important to remember that there does not exist a strict dichotomy between asset-reliant and labour-intensive undertakings, as surely there exist plenty of undertakings that inhabit characteristics of both categories of undertakings. In such situations, it is entirely plausible that no special meaning is attributed to any of the *Spijkers* factors, allowing for more equality between the factors to be considered. As clearly stated by the Scottish courts, the case law of the ECJ must not be interpreted as 'laying down an invariable requirement that, in the context of a claimed TUPE-transfer, a given business must necessarily be characterized as either 'asset-reliant' or 'labour-intensive', as if those were mutually exclusive categories that defined exhaustively the range of possibilities that could arise.'[240] All in all, the *Spijkers* factors are single factors in the overall factual consideration of whether a transfer of undertaking has occurred. The weight attributed to any of these factors is entirely dependent upon the circumstances of the case, indicated by the type of undertaking being transferred and determined by the activity carried on or the production or operating methods.

A special type of undertaking, that by its very nature may be prevented from being the subject of a cross-border transfer of undertaking is the location-dependent undertaking. Where the location of the transferred undertaking is vital to its identity, it is this very location that may prevent a cross-border transfer of undertaking from taking effect. The identity of a particular undertaking may be so closely related to its location that a cross-border relocation of the undertaking would result in a loss of identity. In this sense, where it concerns cross-border transfers of undertakings that involve a cross-border relocation, a distinction has to be made between location-dependent undertakings and undertakings that will be able to function regardless of their location.[241] Location-dependent undertakings will only be able to

[240] *Scottish Coal Ltd v McCormick and others* [2005] CSIH 68; A test requiring the classification of a business entity as either asset-reliant or labour-intensive would encourage transferee and transferor to structure the transfer in such a way as to avoid application of national acquired rights provisions. In these cases the putative transferee in its decision on taking over the necessary assets or employees could decide on whether the undertaking retains its identity. Such a choice abundantly conflicts with the aim and purpose of the directive. Although the ECJ appears to be leaning more and more in this direction, a strict dichotomy between asset-reliant and labour-intensive undertakings should not readily be assumed; *Cf.* McMullen 2016, p. 464; Barnard 2012, p. 597.

[241] Niksova 2014, p. 20.

continue their economic purpose with the transferee if the location, e.g. the property or plot that the undertaking is situated upon, is transferred as well. In order for a transfer of undertaking to be established the transferee must be able to continue (the operations of) the undertaking in the same way as the transferor. The location of the undertaking is only essential if its continuation is dependent upon it.[242] Examples of location-dependent undertakings are undertakings that rely heavily on (the exploitation of) natural resources such as quarries,[243] mines[244] and hydro power plants. Non-location-dependent undertakings will surely be able to transfer to a foreign transferee at a foreign location. A cross-border relocation of such an undertaking will not prevent a transfer from taking place. In fact, in *Merckx*[245] the ECJ confirmed that the relocation of the transfer undertaking upon or immediately after the transfer does not prevent a transfer of undertaking from taking effect.[246] Even though this case did not involve a cross-border transfer of undertaking, a similar approach should be decisive in cross-border situations.

*5.2 Transfer of tangible assets*

In its traditional view, the transfer of an undertaking relied heavily on the transfer of tangible and intangible assets. However, as the present case law of the ECJ shows, the transfer of tangible or intangible assets is one of multiple criteria that determine whether a transfer of undertaking has occurred. Surely in case of asset-reliant businesses, where a transfer of undertaking is accompanied by the transfer of tangible assets, it will be easier to establish whether a transfer of undertaking has occurred than in situations where it involves businesses that are mostly labour-intensive. As outlined above, all of the *Spijkers*-factors are part of an overall assessment and none of the individual factors can be considered in isolation, nor is the existence of every factor a precondition for the economic entity transferred

[242] BAG 12 February 1987 – 2 AZR 247/86, *NZA* 1988,70; Franzen 1992, p. 42.

[243] E.g. stone, rock, rubble, stand, gravel or slate quarries. In BAG 12 February 1987 – 2 AZR 247/86, *NZA* 1988,70, the *Bundesarbeitsgericht* stated that stone quarries are location dependent undertakings.

[244] E.g. oil, uranium, coal, salt, kalium, clay or metal mines.

[245] Joined Cases C-171/94 and C-172/94 *Albert Merckx and Patrick Neuhuys v. Ford Motors Company Belgium SA* [1996] *ECR* I – 1267, ECLI:EU:C:1996:87

[246] IDS 2011, p. 497.

to retain its identity. In certain, mostly labour-intensive, sectors a business may be able to function even without any significant tangible assets. As is apparent from the case law established by the ECJ, it is possible for an economic entity to be transferred even in absence of any assets being transferred to the transferee.[247] In labour-intensive undertakings, the absence of any assets being transferred cannot, in those cases, justify the preclusion of the existence of a transfer.[248] In asset-reliant undertakings the transfer of assets, whether tangible or intangible, is still a substantive consideration in the overall assessment of whether a transfer of undertaking has occurred. To this end it must be noted that in situations that involve a cross-border transfer of undertaking that is accompanied by a cross-border relocation the transfer of intangible assets is mostly immaterial. If an asset-reliant undertaking, such as a business involved in the manufacturing process, is transferred abroad (as indicated in Chapter 1 the offshoring of production activities is mostly cost driven) it is the transfer of tangible assets, such as production machinery and other production systems that is essential to the transfer and to the continuation of the undertaking.[249] An important factor in the overall consideration is whether the tangible assets are essential to the continuation of the business or undertaking to be transferred and its economic aim. In some cases involving asset-reliant undertakings, the simple transfer of production elements may constitute a retention of identity even if the organisational autonomy of the transferred undertaking is not preserved. In *Klarenberg* the ECJ held that the Acquired Rights Directive 'applies to a situation where the part of the undertaking or business transferred does not retain its organisational autonomy, provided that the functional link between the various elements of production transferred is preserved, and that that link enables the transferee to use those elements to pursue an identical or

[247] As was the case in Joined Cases C-171/94 and C-172/94 *Albert Merckx and Patrick Neuhuys v. Ford Motors Company Belgium SA* [1996] *ECR* I – 1267, ECLI:EU:C:1996:87 where only involved the partial transfer of staff and a recommendation of the new undertaking to the existing client base.

[248] Case C-392/92 *Christel Schmidt v, Spar- und Leihkasse der früheren Ämter Bordesholm, Kiel und* Cronshagen [1994] ECR I- 1326, ECLI:EU:C:1994:134, para. 16; Case C-13/95 *Ayse Süzen v Zehnacker Gebäudereinigung GmbH Krankenhausservice* [1997] ECR-I 1259, ECLI:EU:C:1997:141, para. 18.

[249] Kania 2012, p. 42.

analogous economic activity.'[250] Consequently, in some cases, the preservation of a functional link is sufficient for the transferred undertaking to retain its identity, provided that this link enables the transferee to pursue activities similar to those pursued by the transferor.

*5.3 Value of intangible assets*

Intangible assets, such as know-how, intellectual property and goodwill can form an important part of the business to be transferred. In fact, the value of these assets may be of such importance that their transfer or non-transfer determines the existence of a transfer of undertaking. Thus, the transfer of e.g. intellectual property will further the assumption that the transferred undertaking has retained its identity, whereas their non-transfer might preclude the undertaking from retaining its identity. In cross-border transfer situations, the transfer of intangible assets, will generally be easily established, especially where it involves the transfer of such assets within the same corporate group, and as such does not differ from their domestic transfer.

*5.4 Transfer of the majority of employees*

In cross-border cases the retention of the identity of the undertaking to be transferred may very well hinge on the transfer of the majority of the employees. As is clear from the case law of the ECJ, in labour-intensive sectors, a grouping of employees who are permanently engaged in a joint activity can constitute an economic entity.[251] 'Such an entity is capable of maintaining its identity after it has been transferred where the new employer does not merely pursue the activity in question but also takes over a major part, in terms of their numbers and skills, of the employees specially assigned by his predecessor to that task.'[252] In such cases, the employees are characterized as a body of assets capable of continuing the activities pursued by the transferor. Especially where it concerns a business primarily involved in the provision of services, such as cleaning services, IT-services or security

[250] Case C-466/07 *Dietmar Klarenberg v Ferrotron Technologies GmbH* [2009] ECR I-803, ECLI:EU:C:2009:85, para. 53.

[251] Case C-13/95 *Ayse Süzen v Zehnacker Gebäudereinigung GmbH Krankenhausservice* [1997] ECR-I 1259, ECLI:EU:C:1997:141, para. 21.

[252] Case C-13/95 *Ayse Süzen v Zehnacker Gebäudereinigung GmbH Krankenhausservice* [1997] ECR-I 1259, ECLI:EU:C:1997:141, para. 21.

services, the transfer or non-transfer of a majority of the employees is decisive in determining the existence of a transfer of undertaking. Thus, in labour-intensive sectors, the non-transfer of the employees to the transferee speaks against the retention of the identity of the transferred undertaking since the qualification and know-how of these employees forms the essence of said undertaking.[253] The sector in which the transferred business or undertaking operates forms an important consideration in determining the weight that is attributed to the transfer of the workforce. Surely in businesses that are able to function even without any significant tangible or intangible assets the transfer of the majority of the workforce is an invaluable component to the existence of a transfer of undertaking. Conversely, in businesses that are mostly asset-driven, such as businesses involved in the manufacturing sector, the transfer of the workforce is of lesser to no importance, especially in comparison to the transfer of tangible and intangible assets.[254]

Here, it should be noted that prior to the existence of any case law of the European Court of Justice on this aspect, although it was mostly considered that the transfer of tangible assets was a *conditio sine qua non* for the existence of a transfer of undertaking,[255] in actuality there existed two different approaches on the concept of undertaking and the conditions required for a successful transfer of undertaking. According to the so-called *entreprise-activité* approach long favoured by the French courts, a transfer of undertaking solely required the continuance of the same or a similar activity, allowing the mere transfer of the workforce to constitute a transfer of undertaking.[256] According to the opposing *entreprise-organisation* approach,

[253] Kania 2012, p. 45; BAG 11 September 1997 8 AZR 555/95, *NZA* 1998, 31; Rolfs/ Giesen/ Kreikebohm/ Udsching, BeckOK BGB § 613a, Note. 33.

[254] Kania 2012, p. 45. *Cf.* Case C-172/99, *Oy Liikenne* [2001] ECR I-761, ECLI:EU:C:2001:59; Case C-340/01 *Carlito Abler and Others v Sodexho MM Catering Gesellschaft mbH* [2003] ECR I-14023, CLI:EU:C:2003:629.

[255] Beltzer 2007 p. 142.

[256] Touati 2008, p. 66; Mouly 2008, p. 142; Cormier le Goff & Bénard 2006, p. 18, 19; Cass. Civ. 27 Febuary 1934, DH 1934, 252 (*Goupy v Société hydroélectrique de l'Ouest constantinois)*: A reflection of this approach can be found in the famous case of Goupy, dating from 1934, which involved a service provision change for the village lighting in the city of Sélif, here the Cour de Cassation held: *'Attendu que ce texte destiné à assurer aux salariés des emplois plus stables doit recevoir son application dans tous les cas où la même*

preferred by German law, the actual transfer of employees was not a criterion in establishing whether a transfer had occurred or in establishing whether the undertaking had retained its identity. It was considered that the transfer of the employment contracts or relationships to the transferee were the legal consequence of and not a precondition for the existence of a transfer of undertaking.[257] According to this approach, a transfer of undertaking could not take effect without the transfer of tangible assets. When the ECJ first addressed the issue, in a case involving the transfer of cleaning contracts, it appeared to embrace the *entreprise-activité* approach by explicitly rejecting the *entreprise-organisation* approach put forward by the German and British governments:

> 'The arguments of the Government of the Federal Republic of Germany and of the United Kingdom based on the absence of any transfer of tangible assets cannot be accepted either. The fact that in its case-law the Court includes the transfer of such assets among the various factors to be taken into account by a national court to enable it, when assessing a complex transaction as a whole, to decide whether an undertaking has in fact been transferred does not support the conclusion that the absence of these factors precludes the existence of a transfer. The safeguarding of employees' rights, which constitutes the subject-matter of the directive, as is clear from its actual title, cannot depend exclusively on consideration of a factor which the Court has in any event already held not to be decisive on its own.'[258]

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*entreprise continue à fonctionner sous une direction nouvelle ; qu'il suit de là que le nouveau concessionnaire d'un service public qui, à l'expiration d'un précédent contrat de concession passé avec une autre personne, est chargé par l'autorité compétente de continuer le fonctionnement du même service public doit être considéré comme un nouvel entrepreneur, au sens du texte susvisé, tenu, dès lors, de respecter les contrats de travail en cours.'* This view as eventually abandoned and from the mid-1980s onwards the French courts adopted a more stringent approach, requiring a legal link or connection *(lien de droit)* between the transferor and transferee.

[257] BAG 12 February 1987 – 2 AZR 247/86, *NZA* 1988,70; BAG 22 May 1985 - 5 AZR 30/84, *NZA* 1985, 775; Preis, Erfurter Kommentar zum Arbeitsrecht, 613a BGB 2015, Note. 24.

[258] Case C-392/92 *Christel Schmidt v, Spar- und Leihkasse der früheren Ämter Bordesholm, Kiel und* Cronshagen [1994] ECR I- 1326, ECLI:EU:C:1994:134., para. 16.

In *Süzen* the ECJ did not revert this judgment, but provided a more nuanced definition of the concept of entity, apparently moving more towards the *entreprise-organisation* approach. In this case, which also involved the transfer of cleaning contracts, the ECJ argued that the concept of entity 'refers to an organized grouping of persons and assets facilitating the exercise of an economic activity which pursues a specific objective.'[259] Consequently, the transferee is to acquire an organized grouping of persons and assets allowing him to continue the economic activities of the undertaking, business or part thereof.[260] Even though the court seemed to expressly prescribe the transfer of both employees and assets, it reiterated its ruling in *Schmidt* that a transfer does not presuppose a transfer of assets. In labour-intensive sectors the employees form the heart of the business to be transferred and are consequently a factor in establishing whether the business transferred has retained its identity. Here, the workforce forms the very essence of the undertaking and provides the business with its identity. According to the ECJ, in these sectors, the transferee has to take 'over a major part, in terms of their numbers and skills, of the employees specially assigned by his predecessor', in order for the undertaking to retain its identity.[261] The existence and introduction of this criterion has been met with resistance; many find it difficult to reconcile the employee-criterion with the purpose of the Acquired Rights Directive, which is to ensure a continuance of employment of the affected employees in the event of a transfer of undertaking.[262] More so, the ECJ, by establishing the transfer of the workforce as a criterion for the existence of a transfer of undertaking has utilized a circular rhetoric, according to which the transfer of the workforce to the transferee is dependent on the factual transfer of the workforce. In this regard, *Beltzer* speaks of a reversal of cause and effect[263]; the transfer of the employment contracts or relationships to the transferee form the effect of

[259] Case C-13/95 *Ayse Süzen v Zehnacker Gebäudereinigung GmbH Krankenhausservice* [1997] ECR-I 1259, ECLI:EU:C:1997:141, para. 13.
[260] Or to pursue similar activities.
[261] Case C-13/95 *Ayse Süzen v Zehnacker Gebäudereinigung GmbH Krankenhausservice* [1997] ECR-I 1259, ECLI:EU:C:1997:141, para. 21.
[262] HR 30 January 2004, *SR* 2004, 31 note Sagel, note 2; Beltzer 2000, p. 20; Barrett 2005; McMullen 2003; McMullen 2001 p. 397; Barret 2009; Davies 2001, p. 231-234; Pochet 1994, p. 934; Sagel 2004, p. 161; Opinion Advocate General Cosmas *Hernández Vidal,* Joined cases C-127/96, C-229/96 and C-74/97 [1998] ECR I-8181, para. 80.
[263] Beltzer 2000, p. 20.

and not a precondition for the existence of a transfer of undertaking.[264] To my mind, for reasons of employee protection, a transfer of undertaking is effectuated by operation of law and should not be made dependent on whether the employees actually transfer to the transferee. Doing so would defeat the entire purpose of the Acquired Rights Directive as this would allow the transferor and transferee to carefully structure the transfer of undertaking in such a way as to avoid application of the Acquired Rights Directive and its national counterparts. Recognising that in labour-intensive sectors the workforce forms the very essence of the undertaking, this workforce is a vital element to be taken into consideration in deciding whether an undertaking retains its identity. As such, where there exists a group of workers engaged in a joint activity on a permanent basis that constitutes an economic entity, that entity will retain its identity if the transferee continues the undertaking. In this, it must be noted that the subjective intent of the transferee should play no part in this consideration, it is the continuation of the business that is decisive. Thus where there exists a workforce that constitutes an economic entity and the transferee decides to continue the undertaking transferred, the rights and obligations stemming from the employment contracts of those working within the transferred undertaking will transfer to the transferee by operation of law. I share the view portrayed by Advocate General *Cosmas* in his opinion in *Hernández Vidal*[265] who argues that it would be absurd to consider that 'the result achieved by applying the directive becomes a condition determining whether it is to apply.'[266] As such, the Advocate General postulates that where it concerns a labour-intensive business it is the presence of 'a group of workers engaged in a joint activity on a permanent basis — a group that is taken over by the transferee or contractor —' that 'is of decisive importance.'[267] In this sense it is considered unimportant whether a certain

[264] *Cf.* BAG 12 February 1987 – 2 AZR 247/86, *NZA* 1988,70; BAG 22 May 1985, *NZA* 1985, 775; Preis, Erfurter Kommentar zum Arbeitsrecht, 613a BGB 2015, Note 24.

[265] Opinion Advocate General Cosmas *Hernández Vidal,* Joined cases C-127/96, C-229/96 and C-74/97 [1998] ECR I-8181

[266] Opinion Advocate General Cosmas *Hernández Vidal,* Joined cases C-127/96, C-229/96 and C-74/97 [1998] ECR I-8199, para. 80: in an effort to avoid this vicious circle the United Kingdom has expressly included the services provision change in its national acquired rights provisions.

[267] Opinion Advocate General Cosmas *Hernández Vidal,* Joined cases C-127/96, C-229/96 and C-74/97 [1998] ECR I-8199, para. 80, para. 84.

number or even a majority of employees becomes engaged by the transferee.[268] One could argue that the criterion should be that where there exists a group of workers engaged in a joint activity on a permanent basis that constitutes an economic entity, that entity retains its identity if the transferee is intent on continuing the undertaking.[269] Such an additional motive criterion however comes with its own problems as there will surely be cases where it is difficult if not impossible to establish whether or not a potential transferor has legitimate reasons for not taking over the existing workforce.[270] More so, although this argumentation may seem plausible in theory, it is difficult to reconcile with the stringent and mechanical test stemming from *Süzen*. The practical reality therefore remains that in labour-intensive sectors an undertaking can only retain its identity if the transferee takes over a major part of the transferor's workforce.[271] This reasoning was, once again, underlined by the ECJ in *CLECE* in 2011, where it argued that the identity of an economic entity that is 'essentially based on manpower, cannot be retained if the majority of its employees are not taken on by the alleged transferee.'[272] As such, even though this leaves room for an intentional circumvention of acquired rights provisions, the retention of identity of (especially) labour-intensive undertakings requires the actual transfer of a major part, in terms of number and skill, of the workforce.[273]

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[268] Opinion Advocate General Cosmas *Hernández Vidal,* Joined cases C-127/96, C-229/96 and C-74/97 [1998] ECR I-8199, para. 80, para. 84.

[269] Rb. Utrecht (ktr.) 22 October 2008, ECLI:NL:RBUTR:2008:BG1311; Similar judgments exist in the United Kingdom: *ECM (Vehicle Delivery Service) v Cox* [1999] IRLR 599; *ADI (UK) Ltd v Willer and others* [2001] IRLR 542; *RCO Support Services and another v Unison and others* [2002] IRLR 401.

[270] *Cf.* McMullen 2001, p. 400; McMullen 2014, p. 151, 152; Barnard 2012, p 597.

[271] McMullen 2016, p. 456.

[272] Case C-463/09 *CLECE SA v María Socorro Martín Valor, Ayuntamiento de Cobis* [2011] *ECLI:EU:C:2011:24*, para. 41.

[273] In this regard *Beltzer* notes that even though the possibility of circumventing the application of acquired rights provisions is undesirable a better definition or criterion of undertaking is difficult to imagine [Case C-463/09 *CLECE SA v María Socorro Martín Valor, Ayuntamiento de Cobis* [2011] *JAR* 2001/57, opinion: Beltzer]; The Dutch district court of Utrecht however portrays a different opinion: in a case involving the transfer of a shop lease agreement the court held that in determining whether the undertaking retained its identity the original intentions of the parties were decisive as the court has the impression that inventory and staff have deliberately not been transferred to the new lessee: Rb. Utrecht (ktr.) 22 October 2008, ECLI:NL:RBUTR:2008:BG1311. Similar judgments exist in the United

In cross-border transfer scenarios, employees will generally be unwilling to change their living environment upon a transfer of undertaking.[274] As such, the likelihood that the (majority of the) workforce will actually transfer abroad with the undertaking is small. This will only be different in situations where the transfer takes place in areas near national borders, enabling the existing employees to maintain their place of residence and involving a minimum to no increase in travel time. In any case, the actual transfer of employees, both in international situations and domestically, will contribute to the presumption that a transfer of undertaking has taken place. Conversely, where the employees from the very essence of the undertaking to be transferred, the non-transfer of the workforce speaks against a transfer of undertaking. Even though it seems likely that a majority of employees will be reluctant to continue its employment abroad, the acquisition of an essential part of the workforce is still conceivable, especially where it concerns transfers in areas near national borders.[275] The closer the (location of) the transferred undertaking after the transfer, the more likely it is that a majority of employees, in terms of numbers and skill, will be willing to transfer to the transferee.[276]

*5.5 Transfer of the client base*

In addition to the transfer of the workforce, the transfer of the client base forms one of the criteria that contribute to the transferred undertaking retaining its identity. There are some types of undertakings where the location of the undertaking to be transferred, for example, shops and restaurants, largely determines the client base. If such an undertaking were transferred to a new location the client base would change. In such a case, the transfer to a new location would speak against a continuance in client base and as such against the retention of identity. On the other hand, the client base of undertakings that are less reliant on location, such as

Kingdom: *ECM (Vehicle Delivery Service) v Cox* [1999] IRLR 599; *ADI (UK) Ltd v Willer and others* [2001] IRLR 542; *RCO Support Services and another v Unison and others* [2002] IRLR 401; Critical in this regard is McMullen (McMullen 2001, p. 397).

[274] *Cf.* McMullen 2005, p. 299; Hepple 2005, p. 175; On the rights of the employees in the event of a change in the place of employment see paragraph 4.

[275] BAG 26 May 2011 AP BGB § 613 a Nr. 409, opinion Deinert.

[276] Preis, Erfurter Kommentar 2015, §613a BGB, note. 34; BAG 26 May 2011 AP BGB § 613 a Nr. 409, opinion Deinert; Hepple 2005, p. 172; CMS report 2006, p. 18.

undertakings in the production and manufacturing sectors and undertakings involved in IT-services is unlikely to change when the undertaking is transferred to a new location, possibly abroad. As *Kania* remarks given the increased fading of national borders and the multiple modi and possibilities of transportation it has become easily possible to serve the same clientele from abroad.[277] This applies to a variety of undertakings and holds true for both asset-reliant, such as factories, and labour-intensive undertakings, such as call-centers, which are easily offshored. The same goes for businesses involved in online services, for which the location of the undertaking is utterly irrelevant.[278] In situations involving outsourcing and offshoring the outsourcing undertaking is deemed to be the client, in such cases a transfer of client base may therefore generally be assumed.

*5.6 Degree of similarities between activities before and after the transfer*

The degree of similarity between the activities carried on before and after the transfer is one of key importance. As stated above, 'the retention of identity is *inter alia* indicated by the actual continuation or resumption by the new employed of the same or similar activities.'[279] However, the fact that similar activities are carried on after the transfer does not warrant the conclusion that the transferred undertaking has retained its identity.[280] According to the ECJ 'an entity cannot be reduced to the activity entrusted to it. Its identity emerges from several indissociable factors, such as its workforce, its management staff, the way in which its work is organised, its operating methods or indeed, where appropriate, the operational resources available to it'.[281] Thus, a substantive change in the organization of the transferred undertaking can preclude the retention of identity.[282] A mere relocation of the undertaking does constitute such a substantive change and as such does

[277] Kania 2012, p. 47.

[278] Preis, Erfurter Kommentar 2015, §613a BGB, note 34.

[279] Case C-392/92 *Christel Schmidt v Spar- und Leihkasse der früheren Ämter Bordesholm, Kiel und Cronshagen* Para. 16 [1994] ECR I- 1326, para. 17.

[280] Preis, Erfurter Kommentar zum Arbeitsrecht 2015, §613a BGB, note 32.

[281] Case C-463/09 *CLECE SA v María Socorro Martín Valor, Ayuntamiento de Cobisa* [2011] ECR I-00095, ECLI:EU:C:2011:24.

[282] BAG 4 May 2006 - 8 AZR 299/05, *NZA* 2006, 1096; BAG 17 December 2009 - 8 AZR 1019/08, *NZA* 2010, 499.

not prevent an undertaking from retaining its identity, even if it is transferred abroad.[283]

*5.7 Period of suspension of activities*

The suspension of activities must be distinguished from a transfer of undertaking, since these are mutually exclusive. In *Ny Mølle Kro* the European Court of Justice established that the temporary closure of an undertaking, and the absence of employees during the time of closure, is a factor to be taken into account in determining whether the undertaking is transferred as a going concern and as such has retained its identity.[284] Where the undertaking ceases to operate for a short period of time this does not preclude a transfer of undertaking from coming into existence.[285] More so, where the other factors of the *Spijkers*-test have been fulfilled, such as the pursuit of similar activities and direction towards the same clientele, the period of suspension of activities may no longer be entirely decisive. Thus, the fewer of the other criteria have been fulfilled, the more likely it is that a short suspension of activities constitutes a closure of the undertaking.[286] With respect to cross-border transfers of undertakings it should be noted that a relocation abroad generally takes more time and as such, the suspension of activities in the country of the transferor (or the original location of the undertaking where these do not coincide) may take longer. In those cases, a closure of the undertaking should not readily be assumed. As such a longer suspension of activities should not preclude a transfer of undertaking from taking effect.[287] As stated by the Commission 'a transfer of an undertaking is a complex legal and practical operation which may take some time to complete'.[288] The Acquired Rights Directive itself remains silent on the period for which activities may be suspended. This period may vary depending on the type of undertaking to be transferred and the complexity of

[283] BAG 26 May 2011- 8 AZR 792/09 *NZA* 2011, 1143; BAG 26 May 2011 - 8 AZR 792/09, AP BGB § 613 a Nr. 409, opinion Deinert; Kania 2012, p. 48.

[284] Case 287/86 *Ny Mølle Kro* [1987] ECR 5465, ECLI:EU:C:1987:573.

[285] Case 101/87 *P. Bork International A/S, in liquidation, and Others v Foreningen af Arbejdsledere i Danmark acting on behalf of Birger E. Petersen and Junckers Industrier A/*S [1988] ECR 3073, ECLI:EU:C:1988:308, para. 16.

[286] Preis, Erfurter Kommentar 2015, §613a BGB, note 35.

[287] Niksova 2014, p. 24; Kania 2012, p. 48.

[288] Case C-234/98 *G.C. Allen and Others v Amalgamated Construction Co. Ltd* [1999] ECR I-8664, ECLI:EU:C:1999:594, para. 32.

the transfer itself. Thus, it is to be assessed on a case by cases basis, bearing in mind the fulfillment of the other *Spijkers*-factors, whether a transfer of undertaking has occurred.[289]

*5.8 Concluding remarks*

The *Spijkers*-factors equally apply to cross-border and domestic transfer scenarios.[290] The above shows, that although cross-border transfers of undertakings are, on occasion, presented with more challenges, it is possible for an undertaking to retain its identity upon a cross-border transfer of undertaking that is accompanied by a cross-border relocation. As such, employees will be entitled to the protection afforded by the Acquired Rights Directive even in situations where upon or after a transfer of undertaking they are 'obliged' to continue their employment at a foreign location. Still, in cross-border transfer situations it will be more difficult to satisfy the factors concerned in the retention of the transferred businesses' identity. It is considered that in situations involving a cross-border relocation of the undertaking to be transferred, several key factors are likely to be amiss, such as the transfer of tangible assets or employees. Even though the *Spijkers* factors are applied to domestic and cross-border transfer situations alike, it appears that there might be additional criteria that have to be taken into account in determining whether a cross-border transfer of undertaking has taken place. To this end, it has been suggested that an undertaking may not retain its identity if upon relocation of the undertaking abroad the undertaking is placed in a different 'environment'. The CMS report states that 'it could be possible to consider that a change in the "environment", i.e. the linguistic, legal, economic and social environment resulting from a relocation of operations abroad, would cause the transferred entity to lose its identity.'[291] This view, which is difficult to reconcile with the existing 'retention of identity'–test, is derived from the *Vidéocolor*-case[292] before the *Chambre Social* ofthe French *Cour de Cassation.* In this case, which involved the transfer of part of an undertaking, located in Lyon, to Brazil,

[289] Franzen 1994, p. 42.

[290] See *e.g.* Deinert 2013, p. 342; Gaul & Mückl 2011, p. 1322; Haanappel-van der Burg 2015; Haanappel-van der Burg 2016 I; Henckel 2012; Kania 2012, p. 36 *et seq.*

[291] CMS report 2006, p. 17.

[292] Cass. soc., 5 April 1995, n° 93-42.690; Cour de Lyon, Ch. Soc. 11 May 1993, *Dr. Soc.* 1993, p. 650.

the *Cour de Cassation* stated that the employment contracts did not transfer to the transferee. The reasons for such non-transfer appear to be founded in the fact that the company moved abroad to a 'different environment'. Surely, a change in the linguistic, legal, economic and social environment resulting from a relocation of operations abroad could be to the detriment of the affected employees. However, it seems to me that a 'change in environment'–test is uneasily reconciled with the existing *Spijkers*-factors. More so, the Acquired Rights Directive does not presently give rise to a distinction between domestic and cross-border transfers of undertakings resulting in the establishment of additional tests for cross-border transfer scenarios. It appears inequitable to deprive the affected employees of the protection afforded by the directive simply due to the fact that the transfer takes place across national borders. If the *Spijkers*-factors have been fulfilled, there is a transfer of a going concern and the undertaking transferred retains it identity. Surely, as a result of the transfer the affected employees may, to their detriment, become subject to a different environment. In these situations, the employees should be able to rely on Article 4(2) of the Acquired Rights Directive, which is discussed below, in paragraph 6.3.

The relocation abroad does not form a factor in considering whether, in situations involving cross-border transfers of undertakings, the transferred undertaking has retained its identity. The location of the transferred undertaking may however, in specific cases, be considered in weighing the seven *Spijkers*-factors. For instance, where the undertaking to be transferred is location-dependent, a cross-border relocation will likely deprive the undertaking from retaining its identity. Still, the location of the undertaking to be transferred does not constitute an independent factor in the 'retention of identity'-test.[293] The 'retention of identity'-test, as developed by the ECJ, applies equally to domestic and cross-border transfers of undertakings.

## 6 Employee mobility

An essential question when it comes to a cross-border transfer of undertaking that involves a cross-border relocation, is whether the

[293] *Cf.* Niksova 2014, p. 25.

employees are required to transfer abroad with the undertaking. Are the employees allowed to object to the transfer of their employment relationship? And what are the effects of the employees' decision not to continue their employment with the transferee? As outlined above, employees will generally view expatriation as an insurmountable obstacle to continuing their employment with the transferee at a foreign location. Few employees will be willing to leave their homes to change their place of employment over (possibly) several hundred kilometers without any protection against future dismissal. Yet, according to the European Commission today's global economy requires employees to accept a greater mobility of their employment.[294] As such the Commission encourages greater job mobility and increased mobility between regions and Member States:

> ´In a Europe with no internal borders, and competing in a global economy, the changing demands of an ageing society and a labour market in constant evolution demand much greater levels of mobility. Worker mobility is a key instrument for an efficiently functioning single market and is essential for allowing more people to find better employment.´[295]

According to the Commission, the place of work constitutes a vital part of the employment relationship or employment contract. In most countries, the employee has the right to oppose a one-sided modification of his employment contract, especially where it concerns vital elements of the employment contract such as remuneration, working hours and the place of employment. By reason of a transfer of undertaking the employment contracts or relationships existing with the transferor on the date of the transfer will transfer to the transferee by operation of law. As such, the new employer, i.e. the transferee, is regarded by law as the employer *ab initio.* This means that the transfer of undertaking does not involve *any* change to the rights and obligations stemming from the employment contract.

[294] Communication from the Commission to the Council, the European Parliament, The European Economic and Social Committee and the Committee of Regions, Mobility, an instrument for more and better jobs: The European Job Mobility Action Plan (2007-2010), COM(2007) 773 final.
[295] COM(2007) 773 final, p. 2.

However, in those situations where the transfer of undertaking is accompanied by a cross-border relocation this (frequently) involves a substantial modification of the employment contract or relationship as the place of employment is set to change due to the transfer of undertaking. As such, the question arises as to the effects of such a transfer on the workforce.

*6.1 Obligation to work*

Fundamental to the employer-employee paradigm are the correlative obligations stemming from the employment contract or relationship: these involve the employee's obligation to work and the employer's obligation to pay wages upon the performance of work.[296] The employment contract or employment relationship forms the basis for determining the extent of the employee's obligation to work. On the rare occasion that the employment contract explicitly specifies the place of performance, it will generally be difficult for the employer to alter the terms of the employment contract one-sidedly, unless the employment contract gives the employer the express right to do so.[297] Surely, the effects and validity of a one-sided alteration of the employment contract will differ depending on the terms of the employment contract, the rights and obligations stemming from collective agreements and the law that governs the employment contract or relationship.[298]

[296] As specified in the previous Chapter, there is no uniform European definition of employee or employment contract or relationship. In his opinion in Case 105/84 [1985] ECR 2642 Opinion Advocate General Slynn commented that a possible definition of employee on the European plain could read: *'one who in return for remuneration agrees to work for another and who can as a matter of law be directed as to what he does and how he does it, whether pursuant to a contract of employment or an employment relationship.'* The definition of employment contract in Article 7:610 BW (of the Dutch Civil Code) lists similar elements to characterize the existence of an employment contract, being the personal performance of work for a specified period of time (1), against pay (2) in subordinate capacity (3).

[297] In Dutch law, in Article 7:613 BW, provision has been made for limiting the operation of the so-called one-sided modification clause. Such a clause, incorporated in the individual employment contract, enables the employer to make a one-sided modification to the employment contract. The one-sided modification clause is based on consensus; at a certain point the employee did consent to enabling his employer, mostly for economic and organizational reasons, to alter certain parts of the employee's employment contract.

[298] In addition, on the basis of Article 8(1) of the Rome I Regulation, in the event that the employment contract holds a choice of law clause, the mandatory provisions of the law that governs the employment contract in the absence of such a choice also bear weight on the ability of the employer to single handedly alter the place of employment.

In most cases, the employment contract does not expressly stipulate a place of performance. In the absence of such an express place of performance, the place of work is determined by other sources, such as the existing collective agreement[299] or the circumstances of the case.[300] To this end, it must be borne in mind that since the employer has the right to provide the employee with instructions, these instructions may also relate to the place of work.[301] There are differences in the laws of the Member States with regard to the one-sided change of the employment contract and whether the place of work may be one-sidedly changed by the employer even in the absence of any express provisions regarding the place of employment. In Belgium, for instance, the place of employment is, *in principle,* considered an essential part of the employment contract.[302] The parties, i.e. employer and employee, are however free to conclude that the place of work is not essential to the employment contract or relationship. This could also be established on the basis of the circumstances of the case. A transfer within a business, from one part of the business to another, will generally not be considered a one-sided change of a substantial employment condition.[303] In both the Netherlands and Belgium an employer appears to be precluded from one-sidedly changing substantial employment conditions by utilizing his right of instruction.[304] On the contrary, in Germany, the transfer of the location of the undertaking in which the employee is employed is a one-sided legal act which is rooted in the employer's right to provide the employee with

[299] A collective agreement may also hold an express clause stipulating the place of work, See Preis, Erfurter Kommentar Arbeitsrecht 2015, § 611 BGB note 806; Graf von Westphalen & Thüsing 2014 , para. 246.
[300] Franzen 1994, p. 149.
[301] BAG 29 October 1997, 5 AZR 573/96; Rb. Midden-Nederland 19 December 2014, *Prg.* 2015/41 in which the court held that the transferee did not provide unreasonable demands or that the work assigned to the employee could not reasonably be expected of her when the place of employment changed and resulted in an increase of travel time (one way) of 1 to 2 hours; Franzen 1994, p. 149.
[302] Cass. 1 December 1980, *RW* 1980-81, 1782; Cass. 27 June 1988, *J.T.T.* 1988, p. 492; Arbrb. Brussel 12 oktober 1998, *Soc. Kron.* 2002, p. 338; Van Eeckhoutte 1996, p. 27; Croimans & de Laat 2008, p. 60.
[303] Buelens & Stroobants 2014, p. 286.
[304] Croimans & de Laat 2008, p. 60.

instructions regarding his employment.[305] To this end the German *Bundesarbeitsgericht* has ruled:

> *'Aufgrund seines Weisungsrechts (Direktionsrechts) kann der Arbeitgeber einseitig die im Arbeitsvertrag nur rahmenmäßig umschriebene Leistungspflicht des Arbeitnehmers nach Zeit, Ort und Art der Leistung näher bestimmen. Er kann auch einen Wechsel in der Art der Beschäftigung vorschreiben oder den Arbeitsbereich verkleinern.'*[306]

Thus, where the place of work is not (clearly) specified in the employment contract, under German law, the employer typically has the right to clarify and change the place of performance (of employment). However, this differs in cases involving a transfer of undertaking. In a case involving a transfer of undertaking from Berlin to Lyon, the *Bundesarbeitsgericht*, ruled that in situations where an undertaking is transferred and relocated to a place, at which the employees, according to the substance of their employment contract, are not obliged to perform their employment, the transferee only enters into the rights and obligations of the employment contracts and relationships, existing at the time of the transfer, of the employees who are willing to perform their employment at the new location.[307] The proposed relocation of the undertaking could not be carried out on the basis of the right of the employer (in this case the transferee) to provide the employees with instructions.[308] Thus it appears, that in cases involving a cross-border transfer of undertaking, the employees are not obliged to continue their employment at a foreign location if their employment contract does not explicitly allow such a change in the place of work. Still, the employee is typically incorporated into the business organization of the employer causing the place of business of the employer to constitute the place of work. If the place of work changes due to a change in the location of the undertaking in which the employees are to carry out their employment, the employees are generally obliged to perform their work at the new location. Whether this also involves an obligation to perform their duties towards their employer at

[305] BAG 20 January 1960 – 4 AZR 267/ 59.
[306] BAG 27 March 1980 – 2 AZR 506/78.
[307] BAG 20 April 1989 – 2 AZR 431/88.
[308] BAG 20 April 1989 – 2 AZR 431/88, AP BGB § 613a Nr. 81, opinion Kreitner.

a foreign location will depend on the individual employment contract.[309] For instance, some employment contracts include a mobility clause. Such a clause either specifies the geographic zone in which the employee is required to operate or, within group structures, requires the employee to fulfill his employment, upon instruction, in the various companies belonging to the group. In the latter situation however, it seems unlikely that the transferor will be able to ask the employee to become employed in a part of the group structure that was not in existence at the time when the employment contract was signed. As stated by *Touati,* in situations involving a cross-border transfer of undertaking, involving a change in the geographic location of the workplace, the employee may, in the absence of a mobility clause in the original contract of employment, dispute the modification of his employment contract to the extent that the transfer results in a dismissal on behalf of the transferee:

> *'Dans les faits, le transfert transfrontalier entraine une modification géographique du lieu de travail, en sorte que, en l'absence de clause de mobilité très adaptée dans le contrat de travail d'origine, le salarie pourra légitimement s' oppose à la modification de son contrat de travail du fait du transfert de sorte que le licenciement sera imputable au nouvel employer chez qui se trouve la modification.'*[310]

Thus, in situations involving a cross-border transfer of undertaking, the individual employment contract will determine whether the employee is required to perform his duties at the new location. Generally however, it appears that a one-sided modification of the place of employment is not accepted, especially where the place of employment is set to change between countries. The right of the employer to provide the employees with directions and instructions regarding their employment does not go so far as to require the employees to perform their duties towards their employer at a foreign location on a permanent basis. The transfer of a (part of) the undertaking of business abroad surely involves a substantial modification of the employment contract or employment conditions which cannot occur without the employees' consent. The employer, i.e. the transferor, only has

[309] Raif & Ginal 2013, p. 219; BAG 20 April 1989 – 2 AZR 431/88, *NZA* 1990, 32.
[310] Touati 2008, p. 122; Cass. Soc. 3 December 1996, *Bull. civ.* V, no. 411.

the freedom to alter the place of employment by agreement with the transferee, in situations where a so-called mobility clause has been inserted into the employment contract. In addition, the sector in which the undertaking to be transferred operates might contribute to the admissibility of the alteration of the employment location. In certain types of businesses, especially those in the transport sector, such as undertakings involved in air travel and seagoing vessels, employees will be more easily required to accept a change in the location of the undertaking.

In conclusion, the transfer of the employment contract or employment relationship of the employees involved in a cross-border transfer of undertaking is likely unfeasible without the consent of the affected employees. Employees who do not consent to changing their place of employment are not required to fulfill their employment abroad and as such are unlikely to transfer to the transferee. This unwillingness to transfer to the transferee does not prevent a transfer of undertaking from taking effect.[311] After all, once a transfer of undertaking is concluded the rights and obligations stemming from the employment contract or relationship transfer to the transferee by operation of law. As such, the employees' unwillingness to perform their employment at the new location is viewed either as an objection to the transfer itself or as a breach of the employment contract or relationship and a reason for (collective) dismissal by the transferee.[312] In some cases however, a cross-border relocation of the undertaking resulting in a change of work may result in a substantial change in working conditions to the detriment of the affected employees, an issue that is discussed below, in paragraph 6.3.

*6.2 Increase in travel time*

It is sometimes argued, that a cross-border transfer of undertaking does not take effect due to the increase in travel time and that as such a cross-border

[311] There exist an exception to this notion: in labour-intensive undertakings the unwillingness of the majority of employees to transfer to the transferee may prevent the undertaking in question from retaining its identity thus preventing a transfer of undertaking from taking effect, see above paragraph 4.4.

[312] In any case, regardless of the cross-border relocation of the undertaking in which they are employed, the employees have the right to object to the transfer of their employment contract or relationship to the transferee, See Chapter 2.

transfer of undertaking will only be feasible if the transfer takes place in areas nearing national borders. For instance, according to German case law the transfer of the business or undertaking over several hundred kilometers might, on its own, prevent the transferred entity from retaining its identity.[313] In this, special consideration is given to the distance between the transferred undertaking both before and after the transfer. In a recent judgment, the Dutch court of Midden-Nederland held that an increase of travel time from ten minutes by bike to two hours via public transport or one hour by car due to a transfer of undertaking did not form an insurmountable obstacle for the employee, nor could such an increase be characterized as a substantial change in working conditions to the detriment of the employee.[314] It was not considered unreasonable for the transferee to demand that the employee carried out her employment at the new location.[315] In its Explanatory Memorandum to Article 7:665 BW, the Dutch national transposition provision of Article 4(2) of the Acquired Rights Directive, the Dutch legislator held that an increase in travel time could amount to a (substantial)[316] change in working conditions to the detriment of the employee. What constitutes a reasonable travel time will vary depending on the employees function and the type of work involved. It seems to me that if an increase in travel time of up to two hours passes the test of reasonableness in domestic situations, the same holds true in situations where the employees are required, after the transfer, to perform their duties abroad. Thus the fact that a cross-border transfer of undertaking may be accompanied by a relocation that will result in an increase of travel time for the affected employees is not an issue that is limited to cross-border transfer scenarios. Surely, in cross-border transfer situations travel time is more likely to increase than it is in domestic situations, depending on the size of the country of the transferor, i.e. the country where the transferred undertaking was situated prior to the transfer. A change in travel time may amount to a change in working conditions to the detriment of the employee and may as

[313] BAG 25 May 2000 – 8 AZR 335/99.

[314] Rb. Midden-Nederland 19 December 2014, *Prg.* 2015/41.

[315] MvT Kamerstukken II 1979-1980 15 940, nr. 3-4, p. 10; Gremmen & Duijm 2002, p. 28; Meulenbelt 1998, p. 6.

[316] In its previous wording, Article 7:665 BW did not include the word 'substantial' and appeared not to comply with the Acquired Rights Directive. The new Article 7:665 BW, which entered into force in 2015, does away with these issues.

such result in the employer being regarded as having been responsible for the termination of the contract of employment or of the employment relationship. What constitutes an unreasonable increase of travel time will have to be determined on the basis of the circumstances of the case, taking into account the rights and obligations stemming from the individual employment contract, the type of work and the function of the employee. To this effect, cross-border transfers of undertakings do not differ from domestic transfers, apart from the fact that travel time is likely to (exponentially) increase where it concerns transfers of undertakings that involve a cross-border relocation of the transferred undertaking.

*6.3 Substantial change in working conditions*

As demonstrated above, the Acquired Rights Directive and its national counterparts apply to cross-border transfers of undertakings in situations involving an intra-European or outbound transfer. The rights and obligations of the affected employees are automatically secured in the event of the cross-border transfer of the undertaking in which the are engaged. The cross-border nature of the transfer does not preclude the undertaking from retaining its identity and may as such not prevent a transfer of undertaking from taking effect.[317] Since the employees cannot exert any influence over the transfer of undertaking and the location at which they are to continue their employment there exist the question of which remedies are available to them in the event of a cross-border transfer of undertaking. After all, a cross-border transfer of undertaking may result in a change in the legal, linguistic, fiscal and social environment. Surely the employees are allowed to object to the transfer of their employment contract or relationship when they do not wish to become employed by the transferor.[318] This right is derived from the fundamental right of free work, according to which employees are allowed to freely choose their employer and cannot be obliged to work for an

[317] However, as is clear from the previous paragraphs, the individual employment contract itself may prevent the employees from being forced to transfer to the transferee. Unless the individual employment contract contains an express mobility clause, the employees can generally not be forced to continue their employment at the new location. *Cf.* McMullen 2005, p. 300, who speaks of a serious breach of contract on the part of the transferee.

[318] Joined Cases C-132/91, C-138/91 and C-139/91 *Grigorios Katsikas v Angelos Konstantinidis and Uwe Skreb and Günter Schroll v PCO Stauereibetrieb Paets & Co. Nachfolger GmbH* [1992] ECR I-06577, ECLI:EU:1992:517.

employer whom they have not freely chosen.[319] The directive does not preclude the employees from objecting to the transfer of their employment relationship.[320] The effects of such objection are to be determined by the laws of the Member States.[321] As such, some Member States, such as Germany and Austria, allow the employees to maintain their employment contract or relationship with the transferee, whereas in other Member States such objection results in a termination of the employment contract.[322] Although the effects of an employee's objection to the transfer of the employment contract or relationship may have different effects throughout the Member States, the reality is that in most cases where an employee decides on his own accord not to continue his employment with the transferee he will not be entitled to any damages or redundancy payments. The question therefore remains whether there are any other remedies available to employees in the event of a cross-border transfer of undertaking which they perceive to be to their detriment.

If the reason for an employee's refusal to transfer to the transferee lies in the fact that a transfer of his employment contract would constitute a detrimental substantial change in working conditions, the employment contract is

[319] *Cf.* Joined Cases C-132/91, C-138/91 and C-139/91 *Grigorios Katsikas v Angelos Konstantinidis and Uwe Skreb and Günter Schroll v PCO Stauereibetrieb Paetz & Co. Nachfolger GmbH* [1992] ECR I-6577, para. 32; In some countries this is even a constitutional right; *Cf.* Article 19 of the Dutch constitution (Grondwet); Article 12(1) first sentence of the German constitution (Grundgesetz); BAG 2 March 2006 - 8 AZR 124/05; BAG 25 January 2001 - 8 AZR 336/00, *NZA* 2001, 840; BAG 18 March 1999 - 8 AZR 190/98 *NZA* 1999, 870; BAG 19 March 1998 - 8 AZR 139/97 *NZA* 1998, 750; BVerfG 24 April 1991, 1 BvR 1341/90, *BVerfGE* 84, 133; BVerfG 10 March 1992, 1 BvR 454/91, *BVerfGE* 85, 360.

[320] Joined Cases C-132/91, C-138/91 and C-139/91 *Grigorios Katsikas v Angelos Konstantinidis and Uwe Skreb and Günter Schroll v PCO Stauereibetrieb Paetz & Co. Nachfolger GmbH* [1992] ECR I-6577, para. 37.

[321] Joined Cases C-132/91, C-138/91 and C-139/91 *Grigorios Katsikas v Angelos Konstantinidis and Uwe Skreb and Günter Schroll v PCO Stauereibetrieb Paetz & Co. Nachfolger GmbH* [1992] ECR I-6577, para. 37.

[322] In the Netherlands for example the employment contract or relationship is considered to have terminated by operation of law once the employee unequivocally expresses his objection. See: Holtzer 2003, p. 54; Van Straalen 1999, p. 149; HR 26 May 2000, *JAR* 2000, 152 (*Veenendal/ van Vuuren)*; HR 24 December 1993, *NJ* 1994, 419 (*Wijnens/ Haarlems Dagblad).*

considered terminated by the employer. On the basis of Article 4(2) of the Acquired Rights Directive, if a transfer of undertaking involves a substantial change in working conditions to the detriment of the employee, the employee may terminate the employment contract at the risk of the employer. In other words: if a transfer constitutes a substantial change the employee is allowed to terminate the employment contract. By reason of Article 4(2) of the Acquired Rights Directive the employer will be regarded as having been responsible for such termination. Where a detrimental substantial change is assumed the national court is required to provide that the employer is to be considered responsible for the termination.[323] According to the Belgian employment appeal tribunal of Luik, which ruled on this matter in a case involving a transfer from Belgium to the Netherlands, such a change in working conditions can only be invoked against the transferee, since the transferee is (primarily) responsible for the change in working conditions.[324]

In cross-border transfer scenarios, the question is not whether there may be a substantial change to the detriment of the affected employees but rather whether a cross-border transfer of undertaking *per se* should be considered to cause such detriment. As stated by the Dutch *Kantonrechter* of *Tilburg* in a case involving a transfer from the Netherlands to Belgium, the ultimate question is whether, in the event of a transfer of undertaking, according to the specific circumstances of the case, the relocation to another country entails a substantial detriment to the working conditions of the employee :

> *'Uiteindelijk gaat het er om of de vestiging in een ander land en de overname van die onderneming in de concrete omstandigheden van dit geval een aanmerkelijk nadeel meebrengt voor de arbeidsomstandigheden van deze werknemer. Kortom, of de omstandigheden voor verzoekster zozeer wijzigen dat het billijk is de arbeidsovereenkomst te ontbinden en het risico daarvan bij de werkgever te leggen. Natuurlijk zijn de verschillen op het terrein van de sociale verzekeringen, belastingen, gezondheidszorg en andere terreinen van het maatschappelijk leven objectief beschouwd tussen*

[323] Case C-399/96 *Europièces SA v Wilfried Sanders and Automotive Industries Holding Company SA* [1998] ECR I- 6965, ECLI:EU:C:1998:532, para. 44.
[324] CT Liège 10 June 1993, *JTT* 1993, 371.

> *Nederland en België niet zodanig substantieel dat kan worden gezegd dat reeds daarom sprake is van aanmerkelijk nadeel (…).'*[325]

In this case, it appears that the *Kantonrechter* considers that differences in social insurance and benefits, taxation, health care and other areas of social life are factors that may attribute to the existence of a substantial change in working conditions to the detriment of the employee. However, between the Netherlands and Belgium differences in these factors are not considered sufficiently substantial to *per se* cause such detriment. Nonetheless the *Kantonrechter* did assume the existence of a detrimental change in working conditions due to the change in employment conditions, (which over time would have to be adapted to the Belgian collective bargaining system) and the increase in travel time. Of additional interest were the limited compensation for travel expenses, the absence of any compensation for the increase in travel time, the changes in working time and the associated (lower) surcharges.[326] In a different case before the Dutch courts, involving a transfer of part of an undertaking from the Netherlands to Belgium, the employees considered the transfer to precipitate detrimental employment, social and fiscal effects and claimed employment by the transferor on the basis of the principles of reasonableness and fairness.[327] This claim is rejected on the basis that the transfer to Belgium, which in this case did not involve a substantial increase in travel time, is not unreasonable. All in all, it seems that the question whether and under what conditions a change in the location of the undertaking will amount to a detrimental change in working conditions is to be decided according to the facts of the case and does not preclude the transferred undertaking from retaining its identity. Whereas some believe that there is no doubt that a cross-border transfer of undertaking will generally amount to a substantial change in working

[325] Ktr. Tilburg 26 July 2007, *JAR* 2007/259, para.. 2.23, 2.24.

[326] Ktr. Tilburg 26 July 2007, *JAR* 2007/259, para. 2.25. Even though the court considers there to be a substantial change in working conditions this does not lead to the application of a different amount of damages compared to a regular procedure for dismissal.

[327] Since the employees wished to remain employed by the transferor it appears they based their claim on the principles of reasonableness and fairness and rather than on Article 7:665 BW, which transposes Article 4(2) Acquired Rights Directive. In the Netherlands, the employees do not have a so-called Widerspruchsrecht, which allows them to remain employed by the transferee once they object to the transfer of their employment contract.

conditions[328] it must be remembered that a cross-border transfer of undertaking *per se* does not amount to a substantial change in working conditions to the detriment of the affected employees.

## 7 Collective effects

This paragraph deals with the collective effects of a cross-border transfer of undertaking. The Acquired Rights Directive in Article 3(3), to a certain extent, makes provision for the continuity of terms and conditions agreed in collective agreements. The issue of the continuation of collective bargaining agreements upon a cross-border transfer of undertaking is one of vast complexity since the systems of industrial relations vary greatly.[329] Differences mainly regard the level of representation and the degree of autonomy of social partners. The differences in collective bargaining systems and practices throughout the Member States are so severe that these differences and variations have on occasion been considered 'virtually insurmountable.'[330] This situation is aggravated, especially where it concerns a possible cumulative application of collective bargaining agreements, such as in situations involving a cross-border transfer of undertaking, by the lack of unified rules on the conflict of laws for collective bargaining agreements and collective employment matters. To this end, in situations involving a cross-border transfer of undertaking the primary question is not which law governs a particular collective bargaining agreement but rather which collective bargaining agreement applies to the employment contracts or employment relationships of the employees directly affected by the cross-border transfer.[331] Thus if an undertaking is transferred to a foreign transferee coupled with a relocation abroad, the question arises whether the existing collective agreement enjoys continued application when both the work and the undertaking involved have transferred abroad. The law that applies to the collective agreement itself therefore plays an important part in determining which collective agreement applies in cross-border transfer situations. It is this law that determines the territorial scope of the collective

[328] H. Fehér (Hungary) in: Kirchner *et al.* 2016, p. 256.
[329] Glassner & Keune 2010, p. 5.
[330] Garcia Blasco 2004, p. 17
[331] *Cf.* Niksova 2014, p. 178; Junker 1992, p. 409 *et seq.*

bargaining agreement concerned. As such, the scope of a particular collective agreement may e.g. be limited to the location of employment, the location of the employer or the person of the employer. For example, the application of the Dutch collective bargaining agreement for haulage services by road and the rental of mobile cranes[332] is limited both to the location of employment and the location of the employer; it applies first to all employees and employers established in the Netherlands who are required to obtain a license according to the *Wet wegvervoer goederen*[333] and second, to all employers and employees of crane rental companies, meaning all companies providing services involving the rental of mobile cranes in the Netherlands.[334] The application of collective agreements may also be limited to the person of the employer, where collective bargaining agreements have been concluded at the enterprise level. For example, *Enexis*, a Dutch energy network operator, applies a company-wide collective agreement to all its employees. Collective bargaining agreements may be concluded at an intersectoral, sectoral or enterprise level.[335] The preferred structure of collective bargaining agreements varies throughout the Member States as do the rules governing the different structures:[336]

> 'The structure of collective bargaining also differs considerably from one country to the next. Although most of these structures gives preference to the sectoral and national level, there has been a pronounced shift in recent years toward the company level. Despite the fact that in all the Member States the usual bargaining parties are the

[332] Collectieve arbeidsovereenkomst Opleidings- en Ontwikkelingsfonds Beroepsgoederenvervoer over de weg en de verhuur van mobiele kranen, *Stcrt.* 2014, Nr. 16315.

[333] The transport of goods by road act, *Stb.* 2013, 233; According to Art. 1(a) the collective agreement appies to: *Alle werkgevers en werknemers van in Nederland gevestigde ondernemingen die vergunningplichtig vervoer krachtens de Wet wegvervoer goederen (hierna Wwg), zoals deze laatstelijk is gepubliceerd op 28 juni 2013 (staatsblad 233), verrichten, en/of die tegen vergoeding geheel of ten dele vervoer verrichten anders dan van personen, over de weg of over andere dan voor het openbaar verkeer openstaande wegen.*

[334] According to Art. 1(b) the collective agreement applies to: *Werkgevers en werknemers in het kraanverhuurbedrijf, waaronder wordt verstaan alle in Nederland werkzame ondernemingen, waarin het bedrijf wordt uitgeoefend van het verhuren van mobiele kranen.*

[335] The growing decentralization of collective bargaining processes at an enterprise and plant level is a fairly recent development; Institut des Sciences du Travail 2002, p. 15.

[336] CMS report 2006, p. 72.

> trade unions and employers' associations or the employers themselves, a clear evolution can also be seen in some countries geared toward permitting an "opening" for bargaining with works committees and other more specific representative subjects.'[337]

Still, there appears to be one common factor in the sense that most European Member States provide mechanisms that extent the application of collective bargaining agreements to a certain sector limited to the territory of the Member State involved. These mechanisms ensure that collective bargaining agreements are legally binding for all employers and employees in that particular sector or territory.[338] In summary, as stated by the CMS report 'the application of collective bargaining agreements is even more problematic on a cross border transfer than on a transfer entirely within national boundaries.'[339] This difficulty first arises from the infinite dissimilarities in national systems of industrial relations, giving rise to varying definitions of the notion of 'collective bargaining agreement' as well as differences in the application of the Acquired Rights Directive. Second, the complexity of issues involving collective bargaining agreements is intensified by the lack of any specific unified conflict of laws provisions concerning collective bargaining agreements and collective employment matters. As this paragraph seeks to outline the collective effects of a cross-border transfer of undertaking, it therefore deals with issues of substantive law as well as the conflict of laws.

*7.1 Conflict of laws*

As stated above, a cross-border transfer of undertaking gives rise to two conflict of laws questions regarding collective bargaining agreements. The Acquired Rights Directive, in Article 3(3) obliges the transferee to, to a certain extent, observe the terms and conditions agreed in collective

[337] Garcia Blasco 2004, p. 18

[338] 'Extension of collective bargaining agreements in the EU. Background paper' , Eurofound 2011, p. 1, available online at:
<http://eurofound.europa.eu/sites/default/files/ef_files/pubdocs/2011/54/en/1/EF1154EN.pdf> accessed: 11 October 2016; A commonly mentioned exception is the United Kingdom which has only recently established laws and regulations 'enabling unions to gain recognition and bargaining rights', See CMS Report 2006, p. 72.

[339] CMS report 2006, p. 72.

agreements as applicable to the transferor. In cross-border transfer situations the question therefore arises whether the existing collective agreement may be applied across national borders, when the cross-border transfer of undertaking has been accompanied by a simultaneous or subsequent cross-border relocation of the transferred undertaking. In other words if an undertaking is transferred from country A to country B, will the collective agreement that is applied (between the transferor and the employees) in country A continue to apply in country B (between the transferee and the employees)? This involves a question in into the scope of applicability, i.e. the territorial scope of the affected collective bargaining agreements, a question which has to be answered by the law that applies to the agreement itself. In other words, one of the conflict of laws questions arising in situations involving a cross-border transfer of undertaking is which law applies to the collective agreement(s) existing with the transferor? In answering this question one must bear in mind that the Acquired Rights Directive, in Article 3(3) requires the transferee to continue to observe the rights and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement. In this sense a strict application of the collective agreement existing with the transferor is not required as long as the transferee commits to observing the terms and conditions stemming therefrom. The first conflict of laws question relating to the territorial scope of collective bargaining agreements, although important in considering the actual continuance of such agreements, is trivial when it comes to establishing the rights and obligations that require protection upon a transfer of undertaking. A second, more important, conflict of laws question is which collective bargaining agreement is to prevail in situations involving a conflict between applicable collective bargaining agreements. For example, collective bargaining agreements existing with the transferee, or the mandatory laws in the country of the transferee or the new country of employment, may require application to the transferred employees.

*7.1.1 Application of collective bargaining agreements*

As for the first question, the territorial scope of collective bargaining agreements is determined by the collective agreements themselves and the law to which they are subject. As stated above, the application of collective bargaining agreements may e.g. be limited, depending on the structure and type of collective bargaining agreement, to the location of employment or

the nationality, person or location of the employer.[340] To this end, internationally operating undertakings or sectors are more likely to include provisions on the territorial scope in the collective bargaining agreement itself.[341] The application of collective bargaining agreements generally appears limited to a particular national (or regional) territory or sector within national territory. As such, if an undertaking is transferred to another country, e.g. another Member State, the transferee will not be operating within the territorial scope of the collective bargaining agreements in force prior to the transfer. In addition, in cross-border transfer situations, it appears unlikely that a foreign transferee will be party to the employers organizations active in the country of the transferor or the country in which the undertaking to be transferred is located. As such, a foreign transferee is not, on its own, bound by the collective agreements that exist with the transferor nor does the Acquired Rights Directive force the transferee to become party to the collective agreement in place at the business or undertaking of the transferor. Requiring the transferee to become party to the existing collective agreement would limit the transferee's right to free association. Instead, Article 3(3) of the Acquired Rights Directive requires the transferee to uphold the terms and conditions agreed in the existing collective agreement.[342] As such, the transferee does become bound by the terms and conditions stemming from the collective bargaining agreement that existed prior to the transfer of undertaking.[343] He does not become party to the collective bargaining agreement on a collective basis, but by reason of Article 3(3) has to uphold the terms and conditions agreed in the existing collective agreement. Therefore, it has been questioned whether upon a cross-border transfer of undertaking the transferee still applies the existing collective bargaining agreement on a collective basis, a question which

[340] Van Hoek distinguishes another category of atypical scope rules commonly used in shipping according to which the flag of the vessel and the domicile of the employee are important criteria, See: Van Hoek 2000, p. 503.
[341] Van Hoek 2000, p. 515.
[342] Proposal for a Directive of the Council on harmonization of the legislation of the Member States on the retention of the rights and advantages of employees in the case of mergers, takeovers and amalgamations, COM (74) 351 final/2, p.6-7; Beltzer 2008, p. 116-117.
[343] Beltzer 2008, p. 122.

according to the CMS report curiously has to be answered, on the basis of Article 6(2) Rome Convention, by the national law of the transferee:[344]

> 'To this extent a CBA will regularly not be applicable collectively as its application is generally restricted to the original national law under which it has been concluded. (…) Furthermore, an application on a collective basis is excluded, if the form of the CBA, e.g. as a works council agreement, is not a concept to the domestic law of the transferee. If a collective application of a CBA is excluded after a transfer of business, the terms and conditions provided for in this agreement must be observed on the basis of the individual employment contract. The possibility to extend the Directive and provide for a collective application of a CBA would raise difficult questions as this extension would require a uniform understanding of CBA within the Member State*s*.'[345]

To my mind, the application of collective agreements, the determination of their territorial scope and the question whether they, upon a transfer of undertaking continue to apply on a collective basis does not necessarily fall within the purview of Article 6 of the Rome Convention or Article 8 of the Rome I Regulation. In fact, the *Guiliano/ Lagarde* report makes clear that Article 6 of the Rome Convention does not apply to collective agreements; the same goes for Article 8 of the Rome I Regulation.[346] The various forms and systems of collective bargaining make that there are different views and ideas on the conflict of laws rule that is to apply where questions concerning the application of collective bargaining agreements arise. For instance, where collective bargaining agreements have been declared universally

[344] CMS report 2006, p. 72. Here the report seems to disregard that Article 6 Rome Convention and Article 8 Rome I Regulation address the individual contract of employment and do not determine the applicable law to collective bargaining agreements. In addition, the CMS report appears to equate the national law of the transferee to the location of the undertaking after the transfer (i.e. the new place of habitual employment). Although these may on occasion be equal, the national law of the transferee does not *per se* equate to the location of the transferred undertaking after relocation.

[345] CMS Report 2006, p. 72-73; the –s has been added by me, since the report contains an obvious spelling error.

[346] Report on the Convention on the law applicable to contractual obligations, *OJ* [1980] C 282/25.

applicable or where their application stems from national law, it is generally considered that they, subject to their territorial scope, form part of the 'provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable' to the individual employment contract, which generally coincides with the laws in force at the habitual place of employment.[347] The declaration of universal application does not alter or preclude the application of the rules regarding the territorial scope incorporated in the collective bargaining agreement.

The assimilation of collective bargaining agreements under the law that applies to the individual employment contract is often met with resistance.[348] A collective bargaining agreement is not concluded between the individual employee and the employer, but every so often between employers' and employees' organizations with similar bargaining power. The aim of protecting the weaker party, which is contained in Article 8 Rome I Regulation and Article 6 Rome Convention, is therefore incompatible with the nature of collective bargaining agreements. In addition, the reference rule for individual employment contracts in an effort to fulfill the aim of protecting the weaker party generally seeks connection to the habitual place of employment of the individual employee, rather than the place of employment of a collective of employees.[349] Accommodating these observations there exists the view that collective bargaining agreements that have been declared universally applicable should apply irrespective of the laws in force at the habitual place of employment, the location of the employer, the nationality of the employer or the choice of law made in the

[347] Art. 8(1) Rome I Regulation; Bloemarts 2004, 37 *et seq.*; Rb. (ktr.) Midden-Nederland 18 March 2015, *JAR* 2015, 83; Günther & Pfister 2014, p. 347; In Germany however, it is generally considered that German collective bargaining agreements apply at least when the individual employment contract is governed by German law. Where the individual employment contract is governed by foreign law, the application of German collective agreements is not as easily assumed since in those situations and with regard to those specific employees the social partners lack the competence to complete a collective agreement: *Cf.* BAG 9 July 2003, AP TVG para. 1 Tarifvertrage: Bau Nr. 261; Oetker, *Münchener Handbuch zum Arbeitsrecht* 2009, § 11 Arbeitskollisionsrecht, para. 123.

[348] Thüsing 2003, p. 1311; Niksova 2014, p. 181; Junker 1992, p. 417; Rehberg 2013, p. 76; Report on the Convention on the law applicable to contractual obligations, *OJ* [1980] C 282/25.

[349] Niksova 2014, p. 181.

individual employment contract, and as such, qualify as overriding mandatory rules under Article 9 of the Rome I Regulation and Article 7 of the Rome Convention.[350] Collective bargaining agreements that are not considered universally binding or that do not apply by reason of law are generally considered, in the absence of a choice of law,[351] subject to the general rule of Article 4 Rome I Regulation and since in collective bargaining agreements it appears unmanageable to identify the person required to effect the characteristic performance the agreement is to be governed by the law of the country with which it is most closely connected pursuant to Article 4(4) Rome I Regulation.[352] In deciding on the closest connection, the place of establishment of social partners or the location of the undertaking are offered as decisive factors.[353] Contrarily, it is sometimes considered that collective bargaining agreements cannot as a whole be assimilated under one of the conflict of laws categories existing under the Rome I Regulation and the Rome Convention due to the various types of rules and regulations of which they are comprised.[354] Collective bargaining agreements may encompass several types of provisions, such as individual normative provisions and collective normative provisions.[355] In this view, individual normative provisions, which are incorporated in the individual employment contract by reason of their direct normative effect, become part of the law that governs the individual employment contract.[356] Collective normative provisions govern the relation between the employer and the employee representative body or the relation between the employer and

[350] Stichting van de Arbeid, *Advies 'Enkele aspecten van de sociale dimensie van Europe 1992',* 5 februari 1991, Publikatienr. 1/91, p. 12; Hönsch 1988, p. 117; BAG 12 January 2005 – 5 AZR 617/01, *EZA* no. 7 (with regard to posted workers); Schaub, *Arbeitsrechts Handbuch*, 2013, § 7. Internationales Arbeitsrecht, para. 17.

[351] It is generally considered that the social partners have the ability to include a choice of law into the concluded collective bargaining agreement, since the collective agreement is based in consensus: *Cf.* Schlachter 2000, p. 64.

[352] Zilinsky 2009, p. 1031-1037; Rehberg 2013, p. 76-77; Staudiger, VO (EG) 593/2008 Art. 8 Individualarbeitsverträge, para. 11 in: Ferrari/Kieninger/Mankowski u.a., *Internationales Vertragsrecht* 2011.

[353] Rehberg 2013, p. 77; Niksova 2014, p. 186.

[354] Niksova, 2014, p. 186-187.

[355] Even 2008, p. 750-754.

[356] Even 2008, p. 750.

employee vis-à-vis third collective entities.[357] These issues may be governed by the law to which they are most closely connected or may even fall outwith the material scope of the Rome I Regulation and the Rome Convention.[358] To this end it has been argued that collective bargaining agreements do not just establish rights and obligations between the contracting parties, but also confer rights on third parties and as such, these agreements cannot be classified as contractual obligations within the meaning of the Rome I Regulation and the Rome Convention.[359] The above shows that there is no unified view or theory on the law that is to be applied to collective bargaining agreements. The variety of views and ideas in this regard makes the issue of the conflict of laws regarding collective bargaining agreements one of vast complexity. Yet, the relevance of the conflict of laws with regard to collective bargaining agreements in situations involving a cross-border transfer of undertaking appears limited. It is generally recognized that the collective bargaining agreement itself determines its territorial scope, which is commonly limited to the territory of a specific Member State. Thus, in general, collective bargaining agreements are characterized by the principle of territoriality and as such are unlikely to require direct application once the affected undertaking is transferred abroad.[360] In addition, a foreign transferee is not be easily bound by the existing collective agreement. He will generally not have been party to the collective bargaining process, either by himself or as a party to an employers' organization. Even where it concerns collective bargaining agreements at the enterprise level, the transferee is not to be considered party to the existing collective bargaining agreement: the acquired rights provisions only ensure his continued position as employer in relation to the individual employment contracts and relationships, they do not effect the transferee becoming party to the existing collective bargaining agreements.[361] As such, in cross-border transfer situations it appears unlikely

[357] Even 2008 p. 751-753.
[358] Niksova 2014, p. 181-182.
[359] Niksova 2014, p. 276.
[360] Staundiger, VO (EG) 593/2008 Art. 8 Individualarbeitsverträge, para. 11 in: Ferrari/Kieninger/Mankowski u.a., *Internationales Vertragsrecht* 2011; Reinhart, *Münchener Kommentar zur Insolvenzordnung, Band 3* 2014,
InsO § 337 Arbeitsverhältnis, para. 10.
[361] Kania 2012, p. 114.

that a collective bargaining agreement will continue to exist on a collective basis. The CMS report therefore considers the terms and conditions stemming from collective agreements to be incorporated into the individual employment contract upon a (cross-border) transfer of undertaking.[362] The incorporation into the individual contract of employment, however, is not as obvious as the CMS report portrays. (Terms and conditions agreed in) collective bargaining agreements that cease to be applicable on their own merit, e.g. because they do not apply to a foreign transferee or at a foreign location, still require application by reason of Article 3(3) of the Acquired Rights Directive and its national counterparts. There exist two views to establishing this continued application: either the terms and conditions are incorporated into the individual employment contract or the terms and conditions are granted continued application by Article 3(3) itself, similar to the continued and after effects given to collective agreements on the national plane.[363] The Acquired Rights Directive itself is not clear on whether the terms and conditions of collective agreements are to be upheld by the transferee on the basis of the individual contract of employment, or, by reason of Article 3(3), on a collective basis. Such collective basis cannot be explicitly derived from the Acquired Rights Directive itself, nor can the incorporation into the individual employment contract. What is clear is that the directive only ensures the continuation of the rights and obligations stemming from collective agreements with respect to the individual employee. The directive does not give rise to the safeguarding of rights and obligations awarded in collective bargaining agreements to third parties, such as employee representative bodies. In its explanatory memorandum to the 1974 proposal, the Commission stated that although the directive does not require the transferee to become party to a collective agreement against his will, the terms of employment embodied in the collective agreement should be respected:

> '(…) in order to prevent the workers losing their terms of employment reached through collective agreements, paragraph 3 intends to provide a compromise: although the status of a party to any collective agreement is not imposed on the transferee, he shall respect existing terms of

[362] CMS report 2006, p. 72.
[363] Kania 2012, p. 115-116.

> employment reached through collective agreements and shall, in the case of collective agreements of limited duration, respect the terms of employment laid down in the collective agreement up to the end of its period of validity and, in the case of collective bargaining agreements for unlimited duration, for a period of one year.'[364]

The Explanatory Memorandum makes clear that the 'terms of employment' reached through collective agreements are to be upheld. Terms and obligations stemming from collective agreements that do not have an effect on the terms of employment and that, as such, confer rights on others than the affected employees are not safeguarded by the directive. The argument that terms and conditions stemming from collective agreements cannot be incorporated into the individual employment contract because they are collective normative provisions that cannot be continued on an individual basis therefore does not hold true.[365] This also follows from the phrasing of Chapter II of the directive, which is entitled 'Safeguarding of employees' rights' and the systematic coherence with Article 3(1) of the Acquired Rights Directive, which is intended to guarantee the rights and obligations stemming from the individual employment contract or relationship.[366] Still, the Acquired Rights Directive in Article 3(3) only ensures the continuance of the terms and conditions agreed in collective agreements on the same terms existing with the transferor and remains silent on the method through which such continuance is to be achieved. The importance of the difference between the two views lies in the manner in which the application of terms and conditions agreed in collective bargaining agreements are secured. If the terms and conditions stemming from a collective bargaining agreement are incorporated into the individual contract of employment, their continuance is required on the basis of Article 3(1) Acquired Rights Directive, whereas if continuance exists on a collective basis such continuance is considered to befall Article 3(3) Acquired Rights Directive.

In light of the above one might ask whether the incorporation of formerly collective terms and conditions into the individual employment contract by operation of law, without the consent of the parties involved constitutes an

[364] COM(74) 351 final/2, p. 6.
[365] *Cf.* BAG 26 September 1979 - 4 AZR 819/77, AP BGB § 613a Nr. 17 opinion Willemsen.
[366] As stated by Kania 2012, p. 120.

unauthorized interference with party autonomy.[367] A compromise between the two views appears to be found in German law. According to the German *Bundesarbeitsgericht* the terms and conditions agreed in collective agreements are, by reason of the German acquired rights provision(s), incorporated into the employment relationship upon a transfer of undertaking. This however, does not mean that they lose their collective basis. In fact, the collective character of the incorporated terms and conditions continues to exist with the transferee and these terms do not become equal to the rights and obligations stemming from the individual employment contract.[368] In any event, regardless of whether terms and conditions stemming from collective bargaining agreements are continued on an individual or collective basis, the Acquired Rights Directive requires the transferor 'to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement, until the date of termination or expire of the collective agreement or the entry into force or application of another collective agreement', regardless of whether it involves a domestic or cross-border transfer of undertaking.

*7.1.2 Conflicting collective bargaining agreements*

The second conflicts question of importance is which collective bargaining agreement is to be applied in case of a conflict between collective bargaining agreements. For instance, upon a cross-border transfer of undertaking, it seems unlikely that the foreign transferee is bound by the same collective agreements as the transferor. In most cases, as outlined above, the transferee will not be party to the collective agreement in existence with the transferor prior to the transfer. The transferee is more likely to be party to a different collective bargaining agreement, either by reason of law or employers' representation. Upon the relocation of the undertaking to the country of the transferee, these collective bargaining agreements may require application to the transferred employees. In its Opinion on the 1974 proposal for a Directive the Economic and Social Committee stated:

[367] *Cf.* Kania 2012, p. 122; *contra* Niksova 2014, p. 276.
[368] BAG 22 April 2009 – 4 AZR 100/08, AP BGB § 613a Nr. 371, para. 61.

> '(…) a collective agreement should also continue to apply temporarily if the transferee is bound by another collective bargaining agreement which also covers the undertaking that has been transferred. Otherwise, if the collective agreement governing the transferee were less favourable than that hitherto applicable to the employees, there would be a risk that the change of employer would automatically result in less favourable terms of employment for the transferred staff.'[369]

In the view of the Committee the affected employees should be entitled to the rights and obligations arising from the collective agreement existing with the transferor for a set period of time. The change of employer should not immediately result in the affected employees being subject to less favourable terms of employment. For this reason the Committee considered that the Acquired Rights Directive should include that 'where the rights and obligations arising from the employment relationship are based on plant or company collective agreements concluded by the transferor, these rights and obligations shall be automatically transferred to the transferee and shall continue in force until such time as another collective agreement has been concluded between the parties concerned.'[370] In addition, with regard to a transferee that is unbound by the collective bargaining agreement of the transferor, the Committee proposed that the transferee shall 'respect the terms of employment laid down in the collective agreement concluded by the transferor until such time as another collective agreement has been concluded between the parties concerned. Should no other collective agreement be concluded between the parties within a period of one year from the date of the entry of the transferee into the employment relationship, the trade association's collective bargaining agreement, if any, by which the transferee is bound shall apply.'[371] Upon instigation of the Economic and Social Committee, the Commission in its 1975 revised proposal for a directive in Article 3(2) concluded that the rights and obligations arising out of a collective agreement to which both transferor and transferee are party shall transfer to the transferee and continue to exist until a new collective

[369] Opinion on the proposal for a Council Directive on harmonization of the legislation of Member States on the retention of the rights and advantages of employees in the case of mergers, takeovers and amalgamations, *OJ* [1975] C255/28.
[370] *OJ* [1975] C255/28.
[371] *OJ* [1975] C255/28.

agreement has been created.[372] In addition the Commission proposed in Article 3(3) that where the transferee is not party to the collective agreement, the conditions of employment agreed in the trade association collective agreement in force with the transferor shall continue to be valid until a new agreement has been concluded, for a maximum of one year following the transfer. Once this period has lapsed, the collective agreement(s) in force with the transferee shall be applied. These provisions however, did not make it into the final directive. Directive 77/187/EEC concluded in Article 3(2) that 'following the transfer within the meaning of Article 1 (1), the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement, until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement', the phrasing of which has not been altered since. On the basis of the wording of this provision, it is often assumed that the transferee is able to directly apply its own collective bargaining agreement to the transferred employees.[373] The obligation of the employer to uphold the terms and conditions agreed in collective agreements seizes to exist when a new collective agreement enters into force. As such, the transferor may be able to conclude a new collective bargaining agreement with the transferred employees or may be able to apply the collective agreements already in force at the undertaking of the transferee. With regard to the general applicability of collective bargaining agreements and the rights and obligations contained therein and their application in time the CMS report argues that after a cross-border transfer, the laws in force in the country of the transferee[374] should apply, although it is aware that this proposal may be difficult to reconcile with the idea that the transferred employees should retain the rights that exist at the time of the transfer.[375] As such, they consider that the Acquired Rights Directive would benefit from a rule determining which law applies to the rights and obligations stemming from a collective agreement. To this end, I believe it should be remembered that the directive does not require the continuance of actual collective agreements, but rather the continuance of rights and

[372] *OJ* [1975] C255/28; COM (75) 429 final.
[373] Beltzer 2014, p. 76; Niksova 2014, p. 277.
[374] Obviously meaning the country of destination.
[375] CMS report, p. 73.

obligations stemming from collective agreements. Since the Member States are required to transpose the provisions of the directive into their national law, the continuance of terms and conditions agreed in collective agreements is safeguarded throughout the Member States. Thus, in intra-European transfer scenarios, regardless of whether the laws at the location of the transferor (i.e. the original location of the transferred undertaking) or that of the transferee (i.e. the location of the transferred undertaking after relocation) apply, the transferee is obliged to continue to observe these terms and conditions until such time that the collective agreement is terminated, expired or a new agreement has entered into force. Indeed, the terms and conditions arising from collective agreements in force with the transferor that exist on the date of the transfer shall continue to be observed by the transferee. To this end, even when the collective effect of the terms and obligations stemming from collective agreements has been terminated, the transferee has to observe the terms and conditions stemming from those agreements, subject to a possible one year ban on modifications. The transferee is, in principle, free to subject the affected employees to a new or amended collective agreement under foreign law.[376] In practice however, this may prove difficult since the affected employees will generally not (immediately) be members of a foreign or transnational workers organization.

*7.2 Observance of terms and conditions agreed in collective agreements*

The rights and obligations related to an employment contract or employment relationship may be based in law, the individual employment contract, collective agreement(s), company (collective) agreement(s) or the everyday practice established between employer and employee. In classifying these rights, unlawful collective agreements, i.e. agreements that are not based in law or collective bargaining rights, and rights and obligations stemming from every practice are considered part of the rights and obligations stemming from the individual employment contract, insofar as they are individually negotiated or have otherwise become incorporated into the individual employment contract.[377] These rights and obligations will consequently transfer to the transferee as rights and obligations arising from

[376] Raif & Ginal 2013, p. 219.
[377] Schima 2004, p. 103.

a contract of employment or from an employment relationship on the basis of Article 3(1) of the Acquired Rights Directive.

*7.2.1 Österreichischer Gewerkschaftsbund*

On the basis of Article 3(3) paragraph 1 of the Acquired Rights Directive 'the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement, until the date of termination or expire of the collective agreement or the entry into force or application of another collective agreement.' In situations where collective agreements are concluded between workers' and employers' associations and that have not been declared generally binding, the directive does not force the transferee to become party to the collective agreement in place at the business or undertaking of the transferor as this would limit the transferee's right to free association. Instead, Article 3(3), which is modelled on French law, requires the transferee to uphold the terms and conditions agreed in the existing collective agreement.[378] The directive allows the Member States to limit the period of observance of a collective agreement up to one year. The implementation of Article 3(3) will therefore differ throughout the Member States. As such, there exist different national rules and regulations on the extent of preservation of terms and conditions agreed in collective agreements. Whereas some Member States allow collective agreements to be substituted by similar agreements, others provide for a strict compliance with the collective agreements existing on the date of the transfer. In the Netherlands, for instance, the adherence to rights and obligations stemming from collective agreements is not restricted by time. To this end, the protection of employees appears unlimited due to the continued and after effects of collective agreements.[379] As such, employment conditions in

[378] Proposal for a Directive of the Council on harmonization of the legislation of the Member States on the retention of the rights and advantages of employees in the case of mergers, takeovers and amalgamations, COM (74) 351 final/2, p.6-7; Beltzer 2008, p. 116-117.

[379] See Article 14a Wet CAO. According to paragraph 2 of this provision the transferee is to adhere to the rights and obligations regarding employment conditions stemming from collective agreements until the expire of the collective agreement or entry into force of another collective agreement (either by law or collective bargaining). Also see Art. 2a Wet AVV; Case C-328/13 *Österreichischer Gewerkschaftsbund v. Wirtschaftskammer Österreich – Fachverband Autobus-, Luftfahrt- und Schifffahrtsunternehmungen* [2014] *JAR* 2014/263, opinion Beltzer.

collective agreements may continue to apply even after expiration of the collective agreement or entry into force of a new collective agreement.[380] This continued effect is derived either from law, on the basis of Article 12 and Article 13 Wet CAO, or from incorporation into the employment contract. To this end, terms and conditions incorporated into the employment contract by express agreement between the parties have hitherto been considered to transfer to the transferee on the basis of Article 7:663 BW, the Dutch provision transposing Article 3(1) of the Acquired Rights Directive. Recent case law of the Court of Justice of the European Union may however shine a different light on this consideration. The case of the *Österreichischer Gewerkschaftsbund* involved the continued effect given to collective agreements established at enterprise level, i.e. company agreements, by Austrian law.[381] The case involves an enterprise level collective bargaining agreement concluded for a group of companies in the air transport sector as well as a collective agreement in force only at a subsidiary of the group. [382] For economic reasons, the parent company decided to transfer its aviation activities to the subsidiary, aiming to subject the employees to less favourable employment terms and conditions under the subsidiary's collective agreement. The collective agreement in force at the parent company, as well as the subsidiary's collective agreement, was terminated with effect from the date of the transfer. However, by reason of §13

[380] In this sense, until such time as a new collective bargaining agreement has been concluded, the provisions oft he former collective agreement are considered to require continued application on an individual basis. As such, the former collective agreements are incorporated into the individual contract of employment. See Gemeenschappelijk Hof van Justitie van de Nederlandse Antillen en Aruba 5 July *1977, NJ* 1978/134; HR 8 April 2011, *JAR* 2011/135, ECLI:NL:HR:2011:BP0580, in this case the *Hoge Raad* rules that the amaneded provisions of an employment agreement may continue to apply after expiration oft he collective bargaining agreement. More so, when these provisions are more beneficial tot he employee than those of a successive collective agreement, they continue to apply on the basis of the individual employment contract; Rayer 2011, p. 30 *et seq.*

[381] Case C-328/13 *Österreichischer Gewerkschaftsbund v. Wirtschaftskammer Österreich – Fachverband Autobus-, Luftfahrt- und Schifffahrtsunternehmungen* [2014] ECLI:EU:C:2014:2197.

[382] The facts of the case are clearly stated in the Opinion of Advocate General Cruz Villalón in *Österreichischer Gewerkschaftsbund v. Wirtschaftskammer Österreich — Fachverband Autobus-, Luftfahrt- und Schifffahrtsunternehmungen* Case C-328/13 [2014] – ECLI:EU:C:2014:909, para. 8-12.

ArbVG[383], the terms and conditions agreed in the collective agreement were given continuing effect until the conclusion of a new collective agreement or an individual agreement between the parties. Following the rescission of the parent company's collective agreement the transferee, i.e. the subsidiary, began applying unilaterally adopted internal guidelines resulting in a deterioration of employment conditions and a significant reduction of salary to the detriment of the transferred employees. The union representing the employees disputed the actions of the transferee and claimed that the effects of the terminated collective agreement should continue as a result of its continuing effect. The representative of the transferee however, believed that the agreement with continuing effect does not constitute a 'collective agreement' within the meaning of Article 3(3) of Directive 2001/23/EC. To this end, the Austrian *Oberster Gerichtshof* posed the following preliminary question:

> 'Is the wording of Article 3(3) of Directive [2001/23], according to which the "terms and conditions" agreed in any collective agreement and applicable to the transferor must continue to be observed "on the same terms" until the "date of termination or expiry of the collective agreement", to be interpreted as also covering terms and conditions laid down by a collective agreement which have continuing effect indefinitely under national law, despite the termination of the collective agreement, until another collective agreement takes effect or the employees concerned have concluded new individual agreements?'[384]

In answering this question the ECJ, echoing the words of Advocate General *Cruz Villalón*, states that the directive does not require the continuation of the existing collective agreement, but rather the continuation of the terms and conditions agreed in collective agreements, 'without the specific origin

[383] Bundesgesetz vom 14. Dezember 1973 betreffend die Arbeitsverfassung (Arbeitsverfassungsgesetz - ArbVG)
StF: *BGBl.* Nr. 22/1974, last altered by *BGBl. I* Nr. 71/2013.

[384] In fact, the Austrian court posed two preliminary questions, the second question being: 'Is Article 3(3) of Directive [2001/23] to be interpreted to the effect that "application of another collective agreement" of the transferee is to be understood as including the continuing effect of the likewise terminated collective agreement of the transferee in the abovementioned sense?'. Since the CJEU saw no need to answer the second question, only the first question is discussed above.

of their application being decisive.'[385] As such, the method utilised in applying the terms and conditions stemming from collective agreements to the transferred employees remains irrelevant. On the basis of this consideration, the Court held that Article 3(3) of Directive 2001/23/EC includes 'terms and conditions laid down in a collective agreement, which, pursuant to the law of a Member State, despite the rescission of that agreement, continue to produce their effects as regards the employment relationship which was governed by them before the agreement was terminated,' 'so long as that employment relationship is not subject to a new collective agreement or a new individual agreement is not concluded with the employees concerned.'[386] Thus, terms and conditions arising from rescinded, discontinued or expired collective agreements that are given continuing effect by law are considered 'terms and conditions agreed in any collective agreement' under Article 3(3) of the Acquired Rights Directive. The fact that this continued effect originates from law is immaterial to this consideration. The mechanisms of providing continuing or after-effect to a collective agreement exist in a variety of Member States. For example, in addition to Austria and the Netherlands, Belgium, to a certain extent provides continued effect in situations where the collective bargaining agreement is wholly or partly incorporated into the individual employment contract. According to Article 23 Wet CAO[387] the individual employment contract that was tacitly altered by a collective agreement remains unchanged when the collective agreement ceases to have effect, unless agreed otherwise in the agreement itself.[388] In situations involving a cross-border transfer of undertaking the transferee is unlikely to be bound by any legal provision extending the application of collective bargaining agreements, except in those situations where the transferee decides to carry

[385] Case C-328/13 *Österreichischer Gewerkschaftsbund v. Wirtschaftskammer Österreich — Fachverband Autobus-, Luftfahrt- und Schifffahrtsunternehmungen* [2014] ECLI:EU:C:2014:2197, para. 24.

[386] Case C-328/13 *Österreichischer Gewerkschaftsbund v. Wirtschaftskammer Österreich — Fachverband Autobus-, Luftfahrt- und Schifffahrtsunternehmungen* [2014] ECLI:EU:C:2014:2197, para. 31.

[387] Wet van 5 December 1968 betreffende de collectieve arbeidsovereenkomsten en paritaire comités.

[388] *'De individuele arbeidsovereenkomst die door een collectieve arbeidsovereenkomst stilzwijgend werd gewijzigd, blijft onveranderd, wanneer de collectieve arbeidsovereenkomst ophoudt uitwerking te hebben, tenzij het anders wordt bedongen in de overeenkomst zelf.'*

on the transferred business or undertaking at the location operated by the transferee. In other words, where a cross-border transfer of undertaking is not accompanied by a cross-border relocation the transferee will be bound by any provision granting continuing effect to an existing collective bargaining agreement to the same extent as the transferor would have. To a certain extent, it seems immaterial whether the transferee is bound by provisions granting continuing or after effects to a rescinded, discontinued or expired collective agreement as the transferee is obliged to continue the rights and obligations stemming from collective agreements that are in force at the time of the transfer. In that sense the transferee does not become bound by the legal provisions existing in the country of the transferor, but is rather required to uphold the terms and conditions agreed in collective agreements. Here, the case law provided by the ECJ makes clear that the specific origin of the applicable collective bargaining rights is irrelevant to the continuation of these rights and obligations by the transferee. As such, the terms and conditions stemming from collective agreements are considered to require continuation on the basis of Article 3(3) Acquired Rights Directive.[389]

*7.2.2 Definition of collective agreement*

The definition of collective agreement is not specified by the directive. As such, the preservation of terms and conditions applies to various types of collective agreements, depending on national transposition measures. Surely, the traditional collective agreement, the application of which is generally limited to those involved, either directly or indirectly, in the collective bargaining process is covered by Article 3(3) of the Acquired Rights Directive and its national counterparts. In this sense a collective agreement applies only to those employers and employees that are members of the employers' and employees' organizations that are party to concluding the collective agreements. Yet, public authorities may decide to extend the scope of (parts of) such a collective agreement and declare it generally binding, for instance by stating that the collective agreement concerned applies to all those involved in a specific sector or geographic area. In addition to the

[389] With regard to Dutch collective agreements Haanappel-van der Burg notes that Dutch collective bargaining law is insufficiently aligned with the Acquired Rights Directive and as such makes a plea for the creation of a separate law for transfers of undertakings, independent from the existing collective bargaining laws: Haanappel-van der Burg 2015, p. 282; *Cf.* Houweling 2014; Jansen 2014, p. 119-120.

classic collective agreement some Member States apply their national legislation transposing Article 3(3) to specific collective agreements restricted to the business or undertaking to be transferred. In these Member States, the transferee is required to observe the terms and conditions of in-house or works council agreements and company (collective) agreements.[390] For instance, in Germany [391] §613a(1) BGB explicitly states that the rights and obligations stemming from the employment relationship, which are based in a company agreement (*Betriebsvereinbarung*) will become part of the employment relationship between the new employer, i.e. the transferee, and the employee and cannot be changed to the detriment of the employee for at least one year after the date of the transfer. In Austria, a mere transfer of undertaking does not alter the application of the existing company (wide) agreements. The simple transfer of the person responsible for carrying on the business does not alter the identity of the transferred business or undertaking and as such cannot alter the company agreements in force at the time of the transfer.[392] § 31 (4) ArbVG[393] clearly states:

> '*Die Geltung von Betriebsvereinbarungen wird durch den Übergang des Betriebes auf einen anderen Betriebsinhaber nicht berührt.'*

Conversely, in the Netherlands these type of company agreements are not classified as collective since the rights and obligations stemming from such agreements only become part of the employment relationship by reason of

[390] E.g. France, Germany and Austria, See CMS Report 2006, p. 72.

[391] §613a(1) second sentence et seq. BGB reads: 'Sind diese Rechte und Pflichten durch Rechtsnormen eines Tarifvertrags oder durch eine *Betriebsvereinbarung* geregelt, so werden sie Inhalt des Arbeitsverhältnisses zwischen dem neuen Inhaber und dem Arbeitnehmer und dürfen nicht vor Ablauf eines Jahres nach dem Zeitpunkt des Übergangs zum Nachteil des Arbeitnehmers geändert werden. Satz 2 gilt nicht, wenn die Rechte und Pflichten bei dem neuen Inhaber durch Rechtsnormen eines anderen Tarifvertrags oder durch eine andere Betriebsvereinbarung geregelt werden. Vor Ablauf der Frist nach Satz 2 können die Rechte und Pflichten geändert werden, wenn der Tarifvertrag oder die Betriebsvereinbarung nicht mehr gilt oder bei fehlender beiderseitiger Tarifgebundenheit im Geltungsbereich eines anderen Tarifvertrags dessen Anwendung zwischen dem neuen Inhaber und dem Arbeitnehmer vereinbart wird.'

[392] Schima 2004, p. 129.

[393] Bundesgesetz vom 14. Dezember 1973 betreffend die Arbeitsverfassung (Arbeitsverfassungsgesetz - ArbVG)
*BGBl*. Nr. 22/1974

the express consent of the employee. To this end, the consent of the employee effectuates the incorporation of rights and obligations stemming from company agreements into the individual employment contract. Consequently, rights and obligations based in company agreements are classified as individual in nature and transfer to the transferee by reason of Article 7:663 BW, the national provision implementing Article 3(1) of the Acquired Rights Directive.[394] The diversity of collective agreements that require preservation throughout the Member States is, once again, an effect of partial harmonization. Accordingly, the directive only seeks 'to ensure that the employee is protected in his relations with the transferee to the same extent as he was in his relations with the transferor under the legal rules of the Member State concerned'.[395] In the case of the *Österreichischer Gewerkschaftsbund* Advocate General *Cruz Villalón* questioned whether the term 'collective agreement' in Article 3(3) of the Acquired Rights Directive is an autonomous concept of EU law or a concept subject to definition by the Member States.[396] He goes on to consider that due to the fact that the directive is set to achieve partial rather than complete harmonization, the provisions of the directive are not always interpreted in an autonomous manner. To this end, the directive makes a distinction between the formation and effects of the employment relationship: whereas the directive leaves it to national law to define how an employment relationship is formed, it does ensure that there are common, minimum rules relating to the effects of the employment relationship upon a transfer of undertaking.[397] The primary aim of the directive is to ensure the safeguarding of the rights of the employees affected by a transfer of undertaking, the origin of those rights is but of

[394] Article 14a Wet CAO only references collective agreements and makes no mention of company agreements; Beltzer 2008, p. 118; Jansen 2014, p. 119.

[395] Case 324/86 *Foreningen af Arbejdsledere i Danmark v Daddy's Dance Hall A/S* [1988] ECR 739, EU:C:1988:72, paragraph 16; Case C-4/01 *Serene Martin, Rohit Daby and Brian Willis v South Bank University* [2003] ECR I-12859, EU:C:2003:594, paragraph 41; and Case C-396/07 *Mirja Juuri v Fazer Amica Oy* [2008] ECR I-8883, ECLI:EU:C:2008:656, paragraph 23.

[396] Opinion Advocate General Cruz Villalón *Österreichischer Gewerkschaftsbund v. Wirtschaftskammer Österreich — Fachverband Autobus-, Luftfahrt- und Schifffahrtsunternehmungen* Case C-328/13 [2014] ECLI:EU:C:2014:909, para. 34.

[397] Opinion Advocate General Cruz Villalón *Österreichischer Gewerkschaftsbund v. Wirtschaftskammer Österreich — Fachverband Autobus-, Luftfahrt- und Schifffahrtsunternehmungen* Case C-328/13 [2014] ECLI:EU:C:2014:909 para. 37, 38.

secondary concern. As such, it is considered that the Acquired Rights Directive does not encompass an autonomous concept of collective agreement; the existence of a collective agreement is to be determined on the basis of national law.[398]

*7.3 Concluding remarks*

Upon a cross-border transfer of undertaking the effects to be given to a collective agreement will largely depend on the applicable law, both to the transfer of undertaking itself and to the collective agreement in dispute.[399] Since the application of collective bargaining agreements, due to their semi-public nature, is mostly subject to principles of territoriality, the actual application of collective agreements may seize once the transferred undertaking is relocated abroad. In addition, the freedom of association prevents the transferee from being forced to become party to existing collective agreements. As such, it seems unlikely that the collective agreements in force with the transferor will *per se* be applicable once the undertaking transfers abroad to the transferee. The directive does not require the continuance of actual collective agreements, but rather the continuance of rights and obligations stemming from collective agreements. In intra-European transfer scenarios, regardless of whether the laws at the original location of the transferred undertaking or the location of the transferred undertaking after relocation apply, the transferee is obliged to continue to observe these terms and conditions.[400] In this sense, terms and conditions stemming from collective agreements befall Article 3(3) Acquired Rights Directive, irrespective of the method used to effectuate their application.[401] Indeed, on the basis of Article 3(3) Acquired Rights Directive, the terms and conditions arising from collective agreements in force with the transferor that exist on the date of the transfer shall continue to be observed by the

[398] Opinion Advocate General Cruz Villalón *Österreichischer Gewerkschaftsbund v. Wirtschaftskammer Österreich — Fachverband Autobus-, Luftfahrt- und Schifffahrtsunternehmungen* Case C-328/13 [2014] ECLI:EU:C:2014:909, p. 43.

[399] The applicable law to the transfer and its collective effects are dealt with in detail in Chapter 4.

[400] Depending on the applicable law to the transfer of undertaking different rules may exist with regard to in- and outbound transfer scenario's. See Chapter 4.

[401] Case C-328/13 *Österreichischer Gewerkschaftsbund v. Wirtschaftskammer Österreich — Fachverband Autobus-, Luftfahrt- und Schifffahrtsunternehmungen* [2014] ECLI:EU:C:2014:2197, para. 25.

transferee. To this end the transferee is required to observe the terms and conditions stemming from those agreements until the date of termination or the expiry of those collective agreements or the entry into force or application of another collective agreement. The Member States are free to limit the period of observance, provided that this period is not less than one year. The optional character of this mandatory period of observance may give rise to issues of conflicting laws in situations where e.g. the Member State of origin (mostly that the transferor) has chosen to utilize this option, whereas the Member State of destination (mostly that of the transferee) has not. In such situations it is important to determine the applicable law to (to the continuing of collective effects under) a transfer of undertaking. As such, the issue of the continuance of collective bargaining agreements in situations involving a transfer of undertaking is one that gives rise to questions that are to be resolved by conflict of laws rules. Still, at least in intra-European transfer scenarios, it is clear that where transferor was bound by a collective agreement according to the laws of Member State A, the transferee is obliged to apply the terms and conditions of that collective agreement to the employees who transfer with the (part of a) business or undertaking to Member State B.[402] Thus, the terms and conditions arising from collective agreements in force with the transferor that exist on the date of the transfer, under the laws in force in the country of the transferor or the country in which the undertaking to be transferred is situated, on the basis of Article 3(3), shall continue to be observed by the transferee.

**8. Pension rights**

Article 3(4)(a) of the Acquired Rights Directive provides that 'unless Member States provide otherwise, paragraphs 1 and 3 shall not apply in relation to employees' rights to old-age, invalidity or survivors' benefits under supplementary company or intercompany pension schemes outside the statutory social security schemes in Member States.' Thus, it is left to the Member States to either apply their national acquired rights provisions to employees' rights to old-age, invalidity or survivors' benefits or to refrain from doing so. As such, even though the application of the Acquired Rights Directive itself does not extend to pension rights, it does not require the

[402] Malmberg 2006, p. 405.

Member States to uphold such exclusion. As a result, differences exist in the national application of these rights throughout the Member States. The rights to old-age, invalidity or survivors' benefits and the application thereof and eligibility therefore differ as well. In addition, these rights and benefits are generally closely connected to a Member State's social security system, which makes their application across national borders even more difficult. In order to facilitate the free movement of pension schemes there exist Directive 98/49/EC[403] on safeguarding the supplementary pension rights of employed and self-employed persons and Directive 2014/50/EU on the acquisition and preservation of supplementary pension rights.[404] The first directive ensures that the vested pension rights of a person leaving a pension scheme due to his relocation to another Member State must be preserved to the same extent as for a person who remains in that Member State. In addition, employees, as beneficiaries of a supplementary pension scheme are entitled to receive their benefits in any Member State. The latter directive, which has to be transposed by the Member States by 21 May 2018,[405] ensures several minimum standards for the protection of pension rights of employees who move between Member States. Thus, pension rights are irrevocably vested after three years of employment and an employee's personal contributions to his pension scheme cannot be lost. When leaving a pension scheme, employees are entitled to keep their vested pension rights in the scheme. In addition, employees are entitled to information on how potential mobility might affect their pension rights. Whereas the directives on the free movement of pension schemes protect the employees involved in an intra-European transfer of undertaking, their application does not extend to employees who move to a third country. Thus in outbound transfer

[403] Council Directive 98/49/EC of 29 June 1998 on safeguarding the supplementary pension rights of employed and self-employed persons moving within the Community *OJ* [1998] L 209/46.

[404] Directive 2014/50/EU of the European Parliament and of the Council of 16 April 2014 on minimum requirements for enhancing worker mobility between Member States by improving the acquisition and preservation of supplementary pension rights *OJ* [2014] L128/1.

[405] According to Article 8(1)of Directive 2014/50/EU states that: 'Member States shall adopt the laws, regulations and administrative provisions necessary to comply with this Directive by 21 May 2018, or shall ensure that the social partners introduce the required provisions by way of agreement by that date. Member States are required to take the necessary steps enabling them to guarantee the results imposed by this Directive. They shall immediately inform the Commission thereof.'

situations the directives do not assist in the preservation of vested pension rights of the employees affected by the transfer, albeit the national acquired rights provisions in force in the Member State where the undertaking is situated may provide for the transfer of rights to old-age, invalidity or survivors' benefits under supplementary company or intercompany pension schemes. In cross-border transfer situations, the question arises which national acquired rights provisions are to prevail in situations involving a transfer of undertaking from a Member State that excludes the application of national acquired rights provisions to supplementary pension schemes to a Member State that does not uphold this exclusion and vice versa; a question that is to be resolved by the conflict of laws.[406] In addition, there is the question as to the cross-border transferability of these pension rights, an issue that is not dealt with in Directive 2014/50/EU. Pension transferability is considered vital to worker mobility and Member States should endeavour to improve the transferability of vested pension rights.[407] There is, at present, no European legislation on the transferability of supplementary pension rights; whether these rights are able to be transferred across national borders is for the Member States to decide. Upon a transfer of undertaking however, the employees do not lose their vested pension rights simply by reason of the cross-border nature of the transfer, since Directive 2014/50/EU ensures 'that the vested pension rights of outgoing workers can remain in the supplementary pension scheme in which they were vested.'[408] In situations involving a cross-border transfer of undertaking supplementary pension schemes in force with the transferor could possibly conflict with the mandatory laws of the country of the transferee or the location of the transferred undertaking after the transfer. The CMS report therefore suggests that the directive, in order to protect the rights of the transferred employees, should refer to the national law of the Member State in which the transferor

[406] See Chapter 4.

[407] Recital 24, Directive 2014/50/EU; European Commission, 'Call for advice to EIOPA regarding transferability of supplementary pension rights', p. 2, available online at: https://eiopa.europa.eu/Publications/Requests%20for%20advice/140520_DG_Letter_to_EIOPA_on__call_for_advice_portability.doc.pdf, *Cf.* EIOPA, 'Consultation paper on a Report on Good Practices on individual transfers of supplementary occupational pension rights', EIOPA-CP-15/001 [2015], available online at:
<https://eiopa.europa.eu/Publications/Consultations/EIOPA-CP-15-001_Pensions_Transferability_Final.pdf> accessed: 9 October 2016.

[408] Article 5(1) Directive 2014/50/EU.

is located[409] or alternatively, that the directive could provide that it is not applicable to the rights to old-age, invalidity or survivor's benefits in cases of cross-border transfers.'[410] As is apparent from the proposed conflict rule for transfers of undertakings in paragraph 8 of Chapter 4, I agree with the report that the location of the transferor or the undertaking to be transferred is best suited to apply in order to safeguard the rights of the affected employees. If employees, under the national law existing in the country of the transferor or the country where the undertaking to be transferred is located, have the right to continue their rights to old-age, invalidity or survivor's benefits, those rights should not seize to exist simply because the undertaking in which they are employed is transferred across national borders. This is in line with the aim of the directive, which is to safeguard the rights and obligations stemming from the employment relationship that exists at the time of, i.e. immediately prior to, the transfer. I see no point in expressly excluding the transfer of rights to old-age, invalidity or survivor's benefits under supplementary company or intercompany pension schemes with respect to cross-border transfers of undertakings. After all, the Member States are still free to introduce laws that are more favourable to the affected employees, which will then give rise to the same conflict of laws questions as presently under discussion. For intra-European transfers of undertakings, the introduction of Directive 2014/50/EU will help to preserve the acquired supplementary pension rights.

**9. Insolvency**

As per Article 5(1) of the Acquired Rights Directive 'unless Member States provide otherwise, Articles 3 and 4 shall not apply to any transfer of an undertaking, business or part of an undertaking or business where the transferor is the subject of bankruptcy proceedings or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor and are under the supervision of a competent public authority (which may be an insolvency practioner authorised by a competent public authority).' Thus, the directive leaves it to the Member States to decide whether they apply their national acquired

[409] CMS report 2006, p. 74.
[410] CMS report 2006, p. 75.

rights provisions to the transfer of insolvent undertakings. Some Member States have chosen to extend the application of their national acquired rights provisions to insolvent undertakings whereas others have not.[411] In cross-border transfer situations, the question thus arises which national acquired rights provisions are to prevail in situations involving a transfer of undertaking from a Member State that excludes the application of Article 3 and 4 to a transferor that is subject to bankruptcy proceedings to a Member State that does not uphold this exclusion as well as the reverse situation.[412] A transfer of undertaking was assumed in the case of a transfer of an insolvent undertaking from Germany to France.[413] In this particular case however, there was no major difference between the acquired rights provisions of the affected laws, since both countries have opted to apply their acquired rights provisions to a transferor that is subject to bankruptcy proceedings. Still, given the differences in the laws of the Member States on insolvency proceedings the CMS report feels that there may be conflicts of law in cases involving a cross-border transfer of undertaking.[414] The European Commission is aware of the differences in national insolvency proceedings and encourages corporate restructuring in an effort to avoid insolvency:

> 'National insolvency rules vary greatly in respect of the range of the procedures available to debtors facing financial difficulties in order to restructure their business. Some Member States have a limited range of procedures meaning that businesses are only able to restructure at a relatively late stage, in the context of formal insolvency proceedings. In other Member States, restructuring is possible at an earlier stage but the procedures available are not as effective as they could be or involve varying degrees of formality, in particular in relation to the use of out-

[411] A 2007 report shows 11 Member States that have applied their national acquired rights provisions to transfers of undertakings against 13 that have not: Commission report on Coucil Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employmees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, COM [2007] 334 final.
[412] *Cf.* CMS report 2006, p. 77.
[413] Cass. soc. 28 March 2006 n°03-43995; Cass. soc. 13 April 1999 *RJS* 1999, n°794 ; BAG 20 April 1989 – 2 AZR 431/88.
[414] CMS report 2006, p. 54.

> of-court processes.[415] (…)A restructuring framework should enable debtors to address their financial difficulties at an early stage, when their insolvency could be prevented and the continuation of their business assured. However, in order to avoid any potential risks of the procedure being misused, the financial difficulties of the debtor must be likely to lead to its insolvency and the restructuring plan must be capable of preventing the insolvency of the debtor and ensuring the viability of the business.'[416]

If insolvency is averted via corporate restructuring, a transfer is within the scope of the Acquired Rights Directive. In countries where national acquired rights provisions do not apply to a transferor that is subject to bankruptcy proceedings there is the risk that the 'tool' of bankruptcy is utilized in order to circumvent the application of the Acquired Rights Directive and its national counterparts.[417] For example, the so-called pre-pack, according to which the continuation of an economically troubled undertaking is pre-planned with the help of the intended trustee in bankruptcy, who upon the undertaking being declared insolvent, in his formal role as trustee realizes the continuation of the undertaking, is sometimes considered an intentional circumvention of acquired rights provisions and may therefore, on occasion, be covered by the directive.[418] In any event, Article 5(4) of the Acquired Rights Directive requires the Member States to take 'appropriate measures with a view to preventing misuse of insolvency proceedings in such a way as to deprive employees of the rights provided for in this directive.' Thus, where the main reason for the institution of insolvency proceedings is based

[415] Commission Recommendation of 12.2.2014 on a new approach to business failure and insolvency, C(2014) 1500 final, Recital 2, p. 2.

[416] Commission Recommendation of 12.2.2014 on a new approach to business failure and insolvency, C(2014) 1500 final, Recital 16, p. 4.

[417] *Cf.* In the Netherlands there is currently much ado about the phenomenon of the so-called pre-pack (similar sentiments exist in the United Kingdom). If the pre-pack, and subsequent bankruptcy is deployed in order to reorganize in silence, the undertaking to be transferred could fall within the scope of the Acquired Rights Directive: See: Beltzer 2014 II, p. 360 *et seq.*; Beltzer 2015, p. 32-43; Wetsvoorstel continuïteit van ondernemingen I, 22 October 2013; Kamerstukken II 2011/12, 33695, 5.

[418] *Cf.* Rb. Noord-Nederland, (ktr. Leeuwarden) 22 August 2014, *JAR* 2014/234, ECLI:NL:RBNNE:2014:4598*;* Peters 2014; Paauw 2015, p. 119 *et seq*.; Beltzer 2014 III, p. 22 *et seq.;* Verburg 2014, p. 26 *et seq.* ; Hufman 2014, p. 32 *et seq.*

in the evasion of the transferor's and transferee's obligations under the directive, regardless of the non-uniformity of insolvency proceedings throughout the Member States, it appears that the provisions of the directive should apply to a transfer that involves a transferor that is subject to insolvency proceedings. Given the differences in national insolvency proceedings and the various applications of national acquired rights provisions to insolvent undertakings, a cross-border transfer of an insolvent undertaking will almost inevitably result in problems of conflicting laws. In summary, with regard to the cross-border transfer of insolvent undertakings it may be concluded that due to the Acquired Rights Directive effectuating only partial harmonization, the laws of the Member States regarding the transfer of insolvent undertakings naturally vary. In cross-border transfer situations this issue appears even more complicated by the variances existing in national insolvency proceedings throughout the Member States.[419] Thus, cross-border transfers of insolvent undertakings are naturally characterized by problems regarding the conflict of laws. To this end, it seems unjustified, in cross-border transfer situations, to deprive the affected employees of the rights to which they are due on the basis of the national law of the location of the undertaking to be transferred.[420] A discussion of the appropriate conflict of laws path, however, is an issue that is reserved for Chapter 4 of the present work.

## 10. Conclusion

The initial aim of this Chapter was to outline the potential substantial effects of a cross-border transfer of undertaking in order to highlight the need for a clear an unified conflict of laws path with regard to cross-border transfers of undertakings. For the purposes of this research cross-border transfers of

[419] Proceedings that have as their object the continuation of the undertaking or business in liquidation are generally not considered insolvency proceedings under Article 5 of the Acquired Rights Directive. In *Dethier/ Dassy* the ECJ held that the directive applies to an undertaking that continues to trade while its being wound up. Since the continuity of the business is assured when the undertaking is transferred there is no justification for depriving the employees of the rights which the directive guarantees them: Case C-319/94 *Jules Dethier Équipement SA v Jules Dassy en Sovam SPRL* [1998] ECR I-1061, ECLI:EU:C:1998:99 para. 31.

[420] For more on the conflict of laws, see Chapter 4.

undertakings are characterized as transfers of undertakings, (most probable) to a foreign transferee, involving a cross-border relocation of the transferred undertaking upon or immediately after the transfer. To this end, three types of cross-border transfer scenarios can be distinguished: the intra-European transfer, the outbound transfer and the inbound transfer. In these scenarios, due to the cross-border relocation that is intrinsically connected to the transfer of undertaking the affected employees are likely to become subject to a different legal, economic and social environment after the transfer. Upon a transfer of undertaking, the Acquired Rights Directive seeks to safeguard the rights of employees (previously) employed in EU-based undertakings; undertakings that transfer from a third state to a European Member State are outside the remit of the Acquired Rights Directive. Thus, the territorial scope of the directive ensures that its provisions apply to transfers of undertakings from one Member State to another and from a Member State to a third state. As such, the directive secures the automatic transfer of the rights and obligations stemming from the employment contract or relationship in both intra-European and outbound transfer scenarios. Since inbound transfers of undertakings fall outside the realm of the Acquired Rights Directive the employees of these undertakings will not be subject to the rights that the directive ensures when the undertaking in which they are employed is transferred and relocated to a Member State. As such, in considering the application of the directive, the location of the undertaking to be transferred is paramount. If the undertaking *to be transferred* is located within European territory[421] the Acquired Rights Directive will yield application. As is its nature however, the directive is not directly applicable to individual actors within the Member States. The application of the directive is ensured through transposition in the Member States; it are the national acquired rights provisions that factually apply in situations involving a transfer of undertaking. In cross-border situations it therefore has to be determined which national acquired rights provisions are to apply, a question that is extensively dealt with in Chapter 4.

Whether it is substantially possible for the Acquired Rights Directive and its national counterparts to apply to the transfer of an undertaking or part of an undertaking or business to a different social, economic and legal

[421] See Article 1(2) of the Acquired Rights Directive (Directive 20001/23/EC).

environment is to be assessed on the basis of the same factors that apply in domestic transfer situations. Relying on the so-called *Spijkers* factors, it has to be determined whether the business or undertaking was transferred as a going concern and has retained its identity after the transfer. The cross-border nature of a transfer of undertaking may, on occasion, in establishing whether the undertaking has retained its identity, provide additional challenges compared domestic transfers of undertakings. For example, where an undertaking is location-dependent the cross-border relocation of the undertaking will by that very reason prevent the retention of identity. The same goes for undertakings that rely heavily on a particular client base that is inextricably linked to the location of the undertaking. In those cases, the loss of that client base may prevent the undertaking from retaining its identity. Even though the retention of identity-test applies to domestic and cross-border transfer scenarios alike, it appears that it will be more difficult to satisfy the *Spijkers* factors upon a cross-border transfer of undertaking, since the transfer of tangible assets or employees is likely to be amiss. Still, once a retention of identity has been assumed, which is not unlikely in cross-border transfer scenarios, the employees will be entitled to the protection afforded by the directive and its national counterparts.

The Acquired Rights Directive only aims to effectuate partial and minimum harmonisation and is not 'intended to establish a uniform level of protection throughout the Community on the basis of common criteria'.[422] 'The directive can be relied on only to ensure that the employee is protected in his relations with the transferee to the same extent as he was in his relations with the transferor under the legal rules of the Member State concerned.'[423] As such, since there may exist differences in the laws of the Member States when it comes to the application of directive there also exist issues of conflicting laws in situations involving a cross-border transfer of undertaking. After all, if all acquired rights provisions were uniformly and equally applied there would be no conflict of laws issues to resolve. The

[422] C-105/84 *Foreningen af Arbejdsledere i Danmark v A/S Danmols Inventar* [1985] ECR 331, ECLI:EU:C:1985:331, para. 16.

[423] Case 324/86 *Foreningen af Arbejdsledere i Danmark v Daddy's Dance Hall A/S* [1988] ECR 739, EU:C:1988:72, para. 16; Case C-4/01 *Serene Martin, Rohit Daby and Brian Willis v South Bank University* [2003] ECR I-12859, EU:C:2003:594, para. 41; Case C-396/07 Mirja Juuri v Fazer Amica Oy [2008] ECR I-8883, ECLI:EU:C:2008:656, para. 23.

present Chapter has shown that by means of partial and minimum harmonisation it is the Acquired Rights Directive itself that facilitates the differences in Member State laws where it concerns the protection of employees in the event of a transfer of undertaking. As is clear from the present Chapter differences may exist e.g. in the definition of employee, the effects awarded to the employees' objection to transfer, to the terms and conditions existing in collective agreements, to rights stemming from supplementary pension schemes and to the application to insolvent undertakings. Consequently, a question of primary concern is which national acquired rights provisions are to prevail in situations involving a conflict between the acquired rights laws existing in the country of origin, at the location of the undertaking to be transferred and in the country of the destination. Upon a cross-border transfer of undertaking the main problems identified by this Chapter stem from the existence of partial and minimum harmonisation. For problems arising from cross-border transfers of undertakings to be solved, it needs to be clearly established which law applies to a transfer of undertaking when that transfer is accompanied by a cross-border relocation.

# Chapter 3 – Jurisdiction

## 1. Introduction

A problem intrinsically linked with the issue of cross-border transfers of undertakings is the matter of international jurisdiction. Which (international) courts can those involved in a cross-border transfer of undertaking, i.e. employees, employee representatives, transferor and transferee, turn to in the event of a dispute arising from or connected to the transfer? Cross-border transfers of undertakings, not unlike any other international transaction or legal relation, are inevitably accompanied by international disputes raising questions pertaining to jurisdiction, conflict of laws[424] and the recognition and enforcement of foreign judgments.[425] In most cases, both the plaintiff and the defendant will prefer litigation in their home country, i.e. their country of domicile, as international litigation can be particularly burdensome for either of the parties. The burdens imposed on the parties for litigating abroad are manifold: in addition to large costs foreign litigants may have to overcome cultural, trust and language barriers and may encounter differences in procedural rules and rules on choice-of-law.[426] It is the court (first) seised of the matter that, on the basis of its own rules of private international law, determines the law applicable to the dispute. As such, it is particularly important for the plaintiff to choose the jurisdiction that will apply the law that is most beneficial to his situation. Since, at a European level, the rules pertaining to transfers of undertakings are rooted in the Acquired Rights Directive it would appear that application of the national acquired rights provisions of any of the European Member States would yield application of largely the same framework. However, due to the nature of the directive, being one of minimum harmonization, differences still remain within the national rules on the transfer of undertakings existing

[424] See Chapter 4.

[425] Beyond the scope of this research. At a European level the recognition and enforcement of foreign judgments in civil and commercial matters, including the transfer of undertaking, is regulated by *Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast)* OJ 20.12.2002 L 31/1.

[426] De Winter 1968, p. 275 *et seq.*

throughout the Member States.[427] Consequently, it is of particular importance for the plaintiff to, from his perspective, be able to secure adjudication in the courts of the Member States that will provide to most advantageous outcome to the dispute. Since the Acquired Rights Directive bestows a variety of rights and obligations on those affected by a transfer of undertaking a large array of claims may possibly result from a cross-border transfer of undertaking. All those directly (or indirectly) affected by the transfer will be able to initiate legal proceedings. This includes a variety of actors such as employees, trade unions, employee representatives, transferor and transferee.

This Chapter exclusively deals with the issue of jurisdiction (in matters) relating to cross-border transfers of undertakings. It first provides a general introduction into the matter of jurisdiction in relation to cross-border transfers of undertakings. In doing so, paragraph 2 gives a rendition of the history and present situation under the Acquired Rights Directive. Since the cause of action, as a primary indicator for the subject matter of the dispute, forms a crucial variable in understanding and classifying the matter of jurisdiction this Chapter, in paragraph 4, reiterates the various claims that may arise from a transfer of undertaking. The aim of this Chapter is twofold: first, it seeks to outline the rules on jurisdiction pertaining to cross-border transfers of undertakings throughout the Member States of the European Union; second, it intends to assess whether these rules on jurisdiction are in need of revision.

## 2. Acquired Rights Directive

The Acquired Rights Directive itself is absent of any rules on international jurisdiction. It simply states in Article 9 that the:

> 'Member States shall introduce into their national legal systems such measures as are necessary to enable all employees and representatives of employees who consider themselves wronged by failure to comply

[427] This is apparent from the previous Chapter, which is intended to highlight the differences in the national laws of the Member States in order to outline the importance of private international law.

> with the obligations arising from this Directive to pursue their claims by judicial process after possible recourse to other competent authorities.'

Consequently, the Member States are obliged to offer those employees and employee representatives adversely affected by a failure to comply with (obligations arising from) the Acquired Rights Directive recourse to the ((inter)national) courts. The obligation of enabling employees and employee representatives 'to pursue their claims by judicial process' applies throughout the Member States. Accordingly, the obligation is not limited e.g. to the Member State in which the undertaking to be transferred is situated[428] or the Member State in which the employee habitually carries out his work. All jurisdictions involved in a cross-border transfer of undertaking are required to offer those negatively affected by a failure to comply with the directive recourse to the courts, provided those jurisdictions are required to give effect to the Acquired Rights Directive.[429] Employees and employee representatives should be able to pursue their claims before a Member State court whenever they 'consider themselves wronged by'[430] a 'failure to comply with the obligations arising from'[431] the directive. An inability for employees and employee representatives to access an internationally competent court would conflict with the primary aim of the Acquired Rights Directive, being the safeguarding (of the rights) of employees in the event of a change in employer.[432] As such, with a view to cross-border transfer of undertakings, it would be preferable if the Member States would shape their rules on international jurisdiction in such a way as to avoid negative conflicts of jurisdiction.

Article 9 of the Acquired Rights Directive facilitates the aim of the directive, which intends to safeguard the rights employees upon a transfer of undertaking, by requiring the Member States to facilitate access to justice for all employees and employee representatives 'who consider themselves wronged by the failure to comply with the obligations arising from the directive'.[433] This intertwines with the generally accepted purpose of rules on international jurisdiction being to facilitate justice in the sense of, among

[428] Hepple 1998.

[429] Surely, states not bound by the directive, i.e. third states, are in no way obliged to comply with any of the provisions, including Article 9, of the directive or the obligations contained therein.

[430] Article 9 Acquired Rights Directive.

[431] Article 9 Acquired Rights Directive.

[432] *Cf.* Recital 3 Directive 2001/23/EC; Recital 2 Directive 77/187/EEC.

[433] Article 9 Acquired Rights Directive.

others, legal certainty. It is in the interests of the parties that they are able to access an internationally competent court.[434] As such, rules allocating jurisdiction should be unambiguous, easily accessible and direct the dispute towards the most appropriate jurisdiction,[435] thus ensuring a predictability of result(s).[436] On the basis of these jurisdictional rules all those involved in a transfer of undertaking, whether employees, employee representatives, transferee or transferor, should be able to determine which (international) forum has jurisdiction over their dispute, e.g. by application of the Brussels I Recast. Once they have determined the appropriate forum the parties will be able to predict the law that will govern their dispute and, to some extent, the outcome of litigation.

In situations involving a cross-border transfer of undertaking issues of international jurisdiction are generally considered[437] to be covered by the *Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast)*[438] (hereafter: Brussels I Recast).

The possibility of amending the Acquired Rights Directive to include special provisions of private international law in cases of cross-border transfers of undertakings, including provisions on jurisdiction was recently assessed and subsequently forsaken. Aiming to identify social and technical problems arising from cross-border transfer of undertakings a report was prepared with a view to consider possible options for a revision of the directive as early as

[434] Strikwerda 2012, p. 214

[435] In is in the interest of both the parties and the State that there is a sufficient connection between the dispute and the forum.

[436] See *e.g.*: Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) *OJ* [2008] L177/6, Recital 6 and 16; Kagami 2006, p. 15-16; Michaels 2006, p. 143 *et seq.*; Gilles 2008, p. 48.

[437] First phase consultation of social partners under Article 138(2) of the EC Treaty concerning cross-border transfers of undertakings, businesses or parts of undertakings or businesses; CMS report 2006; Laagland 2011, p. 8 *et seq.*; Veldmaat & van Assendelft de Coningh, 2012, p. 24; IDS 2011, p. 505 *et seq*.

[438] OJ 20.12.2002 L 31/1; The Brussels I Recast is applicable in all 28 European Member States, including Denmark. On 20 December 2012 Denmark notified the Commission of its decision to implement the contents of Regulation (EU) No 1215/2012, see Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters OJ 21.3.2013 L79/4.

1998.[439] This report considered Article 5(1) of the Brussels Convention, the predecessor of the Brussels I Regulation and the Brussels I Recast, to adequately deal with issues of jurisdiction in case of employment matters and thus saw no need to amend the Acquired Rights Directive in this regard.[440] A 2004 memorandum on the rights of workers in cases of transfers of undertakings by the Commission revived the issue by identifying certain problems of private international law likely to accompany an increase in cross-border transfers.[441] An ensuing study conducted to review the 'main legal and technical problems'[442] arising from a cross-border transfer of undertaking and the solutions provided by private international law underlined the findings of the 1998 report: the issue of jurisdiction in case of a cross-border transfer of undertaking was deemed sufficiently covered by the Brussels I Regulation.[443] A consultation of social partners pursuant to Article 138(2) of the Treaty with a view to clarifying the directive with respect to cross-border transfer of undertakings provided a similar opinion.[444] As such, there exists, both on a European level and in legal

[439] Hepple 1998, p. 26-27.

[440] Hepple 1998, p. 26-27.

[441] *Commission services' working document. Memorandum on rights of workers in cases of transfers of undertakings* 2004, p. 11-12, available online (18.12.2013) at: <http://ec.europa.eu/social/BlobServlet?docId=2444&langId=en>.

[442] CMS report 2006, p. 1.

[443] CMS report 2006, p. 58-60, 80. However, the report differs from the 1998 report in the sense that the reporters made one small suggestion with regard to the issue of jurisdiction: the directive should provide that in determining jurisdiction on the basis of the Brussels I Regulation the term 'habitual place of work' should be 'the place of work where the employee has effectively and regularly rendered his services (Member State A)' or 'if the employee actually starts to work at the transferee's site (Member State B) then this place.' [CMS report 2006, p. 80]

[444] First phase consultation of social partners under Article 138(2) of the EC Treaty concerning cross-border transfers of undertakings, businesses or parts of undertakings or businesses, available online at: <ec.europa.eu/social/BlobServlet?docId=2442&langId=en> [accessed: 9 October 2016]; A 2007 Commission report signaled the problems regarding cross-border transfer of undertakings and announced a consultation of social partners: *Commission Report on Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses*, COM(2007) 334 final. For a response of social partners see: UEAPME 's reply to the first phase of consultation concerning cross border transfers of undertakings [2007] available online: www.ueapme.com/docs/pos_papers/.../070801_pp_1st_consult_transfer.pdf

literature, a certain consensus that issues of jurisdiction in relation to a cross-border transfer of undertaking are to be assessed on the basis of. the Brussels I Recast. This Chapter will adhere to this assumption by providing an overview of the rules on jurisdiction under this private international law instrument, affecting those wanting to initiate legal proceedings in disputes relating to a cross-border transfer of undertaking.

### 3. Jurisdictional classification

Determining which (international) court has jurisdiction over a dispute arising from or connected to a cross-border transfer of undertaking requires the use of one of the basic tools of private international law, known as jurisdictional classification or characterisation. The aim of jurisdictional classification is to identify the court that has jurisdiction over the issue in dispute.[445] Rules on jurisdiction frequently differ depending on several variables, such as the subject matter of the dispute. In essence, there exist various jurisdictional categories providing different rules on jurisdiction for (disputes over) different matters of substantive law. In endeavoring to ascertain which jurisdictional rules apply in a dispute concerning a cross-border transfer of undertaking one can therefore wonder whether issues concerning a transfer of undertaking are subsumed by the Brussels I Recast[446], which in the European Member States generally applies in civil and commercial matters,[447] or whether these issues amount to a separate jurisdictional category. The latter question of whether claims arising from a cross-border transfer of undertaking are to be classified as a whole, covered by an independent jurisdictional category, in deciding on the matter of jurisdiction is one that is rarely addressed.[448] As outlined above, the Brussels

[accessed: 9 October 2016]; ETUC First phase consultation concerning cross border transfers of undertakings, business, or parts of undertakings or businesses [2007], available online at < http://www.etuc.org/sites/www.etuc.org/files/ARD_ETUC_answer_final2007_1.pdf> [accessed: 9 October 2016].

[445] See e.g. Rogerson 2001, p. 406; Mankowski 2009, p. 22.

[446] A similar subsumption may be envisaged under the 2007 Lugano Convention.

[447] Article 1 Brussels I Recast. Likewise, rules on jurisdiction in cases of a cross-border transfer of undertaking may be covered by a different private international law instrument, such as the 2007 Lugano Convention where it concerns the EFTA signatories to the EEA.

[448] This issue or question is related to the question whether the Acquired Rights Directive as such would benefit from its own rule(s) on jurisdiction.

I Recast (along with its predecessors) are commonly viewed as providing the jurisdictional rules used to determine which court has jurisdiction in matters concerning a cross-border transfer of undertaking.[449] In applying the provisions of these private international law instruments there appears to be a general consensus that the cause of action as a primary indicator for the subject matter in dispute, separate from the transfer of undertaking as a whole, is decisive in determining jurisdiction.[450] Yet, one can wonder whether any and all claims arising from or connected to a cross-border transfer of undertaking should fall under the same jurisdictional category, even within the realm of the existing private international law instruments such as the Brussels I Recast. The question may arise whether all claims arising from a transfer of undertaking should be subsumed under e.g. the special jurisdictional category for individual employment contracts. Admittedly, the primary purpose of the Acquired Rights Directive being the continuation of the employment relationships upon a transfer of undertaking is rooted in the protection of the individual employee.[451] A transfer of undertaking is predicated on the existence of an employment relationship between the transferor and the employee(s). Without the presence of such an employment relationship a transfer of undertaking would not take effect.[452] As such, disputes concerning a cross-border transfer of undertaking are,

[449] Veldmaat & van Assendelft de Coningh 2012, p. 52; Laagland 2011, p. 8; CMS report, p. 58-60, 80; Hepple 1998, p. 26-27; When compared to the matter of the conflict of laws the acquiescence in the applicability of the Brussels I Regulation appears somewhat odd in the sense that where it concerns the classification under the conflict of laws the question of whether the cross-border transfer of undertakings amount to an independent reference category, are overridingly mandatory in nature or are subsumed by the Rome I Regulation is one of constant debate. For more on this matter see Chapter 4.

[450] Laagland 2011, p. 8; CMS report 2006, p. 58-60, 80; Hepple 1998 p. 26-27.

[451] At its core, the directive seeks 'to ensure that employees do not forfeit essential rights and advantages acquired prior to a change of employer'; COM(74) 351, p. 3.

[452] Only those employees protected as employees under national law are affected by the Acquired Rights Directive.[452] Article 2(1)(d) Directive 2001/23/EC. A contractual relationship with the transferor is not required in all circumstances: the directive also protects permanently posted workers within a group (of undertakings). Case C-242/09 *Albron Catering BV v FNV Bondgenoten en John Roest* [2010] ECR I-10309, ECLI:EU:C:2010:625*;* HR 5 April 2013, *JAR* 2013/125, ECLI:NL:HR:2013:BZ1780. For the specific problems created by the use of a national employee definition in respect of cross-border transfer of undertakings or a more detailed definition of the concept of employee see Chapter 3.

almost without fail, rooted in (or at least marginally connected to) the individual employment contract or relationship.

The approach where connection is sought to the special private international law category for individual employment contracts is not uncommon where it concerns the cross-border transfer of undertakings. In determining the applicable law to (the effects of) a transfer of undertaking connection is regularly sought to the individual employment contract.[453] In fact, it is the prevailing view in both literature and case law that the applicable law to a transfer of undertaking (as a whole) is determined by the reference rule existing for individual contracts of employment.[454] A transfer of undertaking essentially effectuates the transfer of the existing employment relationship(s) to the transferee. It is this close connection to the employment contract or relationship that may justify, under the *Savignian* conflicts approach, the conflict of laws connection to the law applicable to the employment contract. The connection to the employment contract is additionally rationalised by the justified reliance of the employee on his continued employment. The employment contract undoubtedly provides the employee with an assured legal position, which includes the right to transfer to the transferee. His interests in maintaining this position take precedence over the need to protect the transferee against unforeseen obligations, such as those resulting from an employment contract. The connectedness with the employment contract or relationship is additionally illustrated by the fact that issues concerning transfer of undertakings repeatedly arise in procedures for (unjustified) dismissal, which under the conflict of laws undeniably belong to the purview of the conflict rule for individual employment contracts. In those cases, the question whether or not a transfer of undertaking has taken place, causing the employee to become employed by the transferee, forms the very essence of proceedings. Consequently, connecting the transfer of undertaking as a whole to the individual employment contract under the conflict of laws is deemed justified by the intrinsic connectedness of the transfer to the

[453] *Cf.* BAG 26 May 2011 – 8 AZR 18/10; BAG 29 October 1992 – 2 AZR 267/92; LAG Baden-Württemberg 17 September 2009 – 11 Sa 40/09; LAG Baden-Württemberg 15 December 2009 – 22 Sa 45/09; ArbG Freiburg 13 March 2009 – 14 Ca 516/08; LAG Hamburg 22 May 2003 – 8 Sa 29/03; Kantonrechter Eindhoven (vrz.) 9 September 2008, JAR 2008/271, ECLI:NL:KTGEIN:2008:BG3811.

[454] See e.g. Article 8 Rome I Regulation.

employment relationship. This raises the question whether the same holds true where it concerns the allocation of international jurisdiction. Does the allocation of jurisdiction for any and all claims arising from a cross-border transfer of undertaking require these claims to be subsumed under the jurisdictional category for individual employment contracts?

Admittedly, the inherent protective nature of the Acquired Rights Directive aligns with the fundamental principle of employee protection that exists within private international law in the areas of jurisdiction and the conflict of laws. The notion that certain parties, including employees, require protection due to their weaker legal, contractual and socio-economic position is one that permeates the area of private international law.[455] As such, rules on jurisdiction (and choice of law) are generally structured *favor laboratoris.* These rules are intended to provide adequate protection for the socially weaker contractual party, i.e. the employee, as can be demonstrated by the judgment of the European Court of Justice in *Mulox IBC v. Geels* pertaining to the rules on jurisdiction for employment contracts as established under a predecessor of the Brussels I Recast, i.e. the Brussels Convention:

> "Proper protection of that kind is best assured if disputes relating to a contract of employment fall within the jurisdiction of the courts of the place where the employee discharges his obligations towards his employer. That is the place where it is least expensive for the employee to commence, or defend himself against, court proceedings."[456]

The *forum loci laboris,* as the place of habitual employment[457], is deemed best equipped to ensure the proper protection of the employee(s). The place where the employee habitually carries out his work is generally the place where it is least expensive for the employee to be engaged in legal proceedings.[458] The interests of the employee are additionally protected by

[455] Polak 2004, p. 323; Lein 2009, p. 186.

[456] Case C-125/92 *Mulox IBC Ltd v Hendrick Geels* [1993] ECR I-4075, ECLI:EU:C:1993:306, para. 19; Cf.: C-437/00 *Giulia Pugliese v Finmeccanica SpA, Betriebsteil Alenia Aerospazio* [2003] para. 18; Case 32/88 *Six Constructions Ltd v Paul Humbert* [1989] para. 13.

[457] This wording which is currently enshrined in Article 21(1)(b) of the Brussels I Recast.

[458] Case C-125/92 *Mulox IBC v Geels* [1993] para. 19; *Cf.*: C-437/00 *Giulia Pugliese v Finmeccanica SpA, Betriebsteil Alenia Aerospazio* [2003] ECR I-3573, ECLI:EU:C:2003:219, para. 18; Case 32/88 *Six Constructions Ltd v Paul Humbert* [1989]

the existence of a particularly close connection between the *forum loci laboris* and the employment dispute. Surely, the place where the employee habitually carries out his work under the employment contract, as the place where the employment relationship is centered, will generally have the most sufficient connection to the employment dispute. Any disputes arising from or connected to the employment relationship appear therefore best adjudicated, at least from a geographic perspective, by the court closest to the place of habitual employment, i.e. the *forum loci laboris*. Where adequate protection of the employee on the private international law plane requires the rules on jurisdiction and the conflict of laws to be (at least marginally) tailored to the needs of the individual employee this may often lead to a certain convergence between the rules on jurisdiction and the conflict of laws.[459] This so-called *'Gleichlauf"* results in the court taking cognizance of the dispute applying its own law(s). As outlined above, for reasons of procedural efficiency and fairness the geographic proximity of a court to the dispute may be a principal consideration to establishing the rules on jurisdiction in employment matters or matters relating to cross-border transfers of undertakings. This principle of geographic proximity bears great resemblance to the principle of the closest connection that exists under the conflict of laws.[460] As such, the reasons underlying the connection to the individual employment contract under the conflict of laws may be of equal value when it comes to establishing international jurisdiction. Where in relation to the conflict of laws it is considered sensible to subject the transfer of undertaking in its entirety to the conflict of laws category for individual employment contracts, due to the inherent connection existing between a transfer of undertaking and the employment relationship, a similar subsumption may seem plausible within the area of international jurisdiction. However, under the conflict of laws, the connection to the individual employment relationship is not the only conflict of laws solution

para. 13; Case C- 37/00 *Herbert Weber v Universal Ogden Services Ltd* [2002] ECR I-2013, ECLI:EU:C:2002:122, para. 40.

[459] *Cf.* De Boer 2012, p. 16; J.B. van de Velden argues that the existence of similar objectives or a 'similar focus' underlying provisions for jurisdiction and choice of law, Gleichlauf is a likely result: Van de Velden 2003, p. 8.

[460] De Boer 2012, p. 16.

advocated;[461] there exist various views, theories and practices on the applicable law to a transfer of undertaking. In this sense it is worth examining whether, in determining the most appropriate rule for designating the competent court in issues relating to cross-border transfers of undertakings there might be a different nexus to which the geographic proximity of a court should be tailored.

For example, where it concerns the issue of cross-border transfer of undertakings it could also be argued that the rules pertaining to the individual contract of employment (under the Brussels I Recast and the 2007 Lugano Convention) should not determine which court takes cognizance over a transfer related dispute. Reasons for opposing subsuming the transfer of undertakings under the jurisdictional category for individual employment contracts equate to the reasons provided for rejecting the conflict of laws connection to the individual employment contract in the debate on the appropriate conflict of laws rule for transfers of undertakings. When it comes to the conflict of laws, the notion that the transfer of undertaking is to be connected to the employment contract is frequently and deservedly rejected in favour of the law of the seat of the undertaking (to be) transferred.[462] Compared to the applicable law to the employment contract, the geographic centre of the undertaking is easily determined. Because the undertaking to be transferred is pivotal to the Acquired Rights Directive, the seat of this undertaking embodies the most natural connecting factor.[463] In this view, the *lex laboris,* when applied to a cross-border transfer of undertaking, does not sufficiently take into account the interests that lie

[461] The idea of *Gleichlauf* combined with the interests of employee protection do not necessarily dictate that the rule allocating jurisdiction in matters relating to a cross-border transfer of undertaking invariably provides jurisdiction to the courts whose laws govern the dispute in substance. However the lack of similar (reference) rules for jurisdiction and choice of law in employment matters has led to a recent motion for a European Parliament resolution on improving private international law; jurisdiction rules applicable to employment (2013/2023(INI)). As will be discussed below in paragraph … this is not the case where it concerns the Brussels I Recast and the 2007 Lugano Convention.

[462] See Chapter 4, specifically paragraph 4.8 in which the preferred conflict of laws path for transfers of undertakings is outlined.

[463] This effect is supported by Article 1(2) of the directive, which causes it to apply 'where and in so far as the undertaking, business or part of the undertaking or business to be transferred *is situated* within the territorial scope of the Treaty [emphasis added KCH]'.

beyond individual employment rights. The effects of a transfer of undertaking do not solely encompass the individual employment relationship, but also concern operational, economic and collective employment interests. Hence, it is assumed faulty to subject all of these rights and interests, such as employee participation rights and the right to the observance of terms and conditions agreed upon in collective agreements, to the law governing the individual employment contract. If one were to align the rules on jurisdiction (as far as possible) with the rules on the applicable law, acceptance of the above view would likely result in the existence or creation of an independent jurisdictional category for the transfer of undertakings on the basis of which jurisdiction is awarded to the courts of the place where the undertaking to be transferred is located. Awarding jurisdiction to these courts would result in geographic proximity between the competent court and the heart of the transfer of undertaking, i.e. the undertaking to be transferred. In addition, utilising the place where the undertaking to be transferred is located in order to determine international jurisdiction would dovetail with the perception that the location of the undertaking to be transferred is key in determining when the provisions of the Acquired Rights Directive require application. In support of the latter perception some European Member States, such as the United Kingdom, Malta and Luxembourg, apply their national acquired rights provisions on the basis of a distinct scope rule whenever the undertaking to be transferred is located within their territory.[464] Subjecting disputes resulting from the transfer of undertaking (in its entirety) to a separate jurisdictional category on the basis of which jurisdiction is awarded to the court(s) of the place where the undertaking to be transferred is situated would, in those Member

[464] The UK's Transfer of Undertakings (Protection of Employment) Regulations 2006 (hereinafter: TUPE) contain a written scope rule in Article 3(1)(a) that qualifies as a unilateral conflict rule indicating the international scope of the UK's acquired rights provisions. Accordingly, TUPE applies whenever the undertaking to be transferred is situated within the territory of the UK immediately prior to its transfer, regardless of the law applicable to the (effects of the) transfer or the law that governs the employment contracts. Article 3(1)(c) of Transfer of Business (Protection of Employment) Regulations of Malta contains a provision similar to that of the UK for Maltese territory as does Luxembourg legislation where it concerns the territory of the Grand Duchy of Luxembourg. Art. L 127-1(2) of the Luxembourg Code du Travail states that *'le présent chapitre s'applique chaque fois que l'entreprise, l'établissement ou la partie d'entreprise ou d'établissement à transférer se situe sur le territoire national du Grand-Duché de Luxembourg'.*

States, ultimately result in a convergence between the rules on jurisdiction and those on the applicable law, thus achieving the perceived ideal of *Gleichlauf*. Yet, without legislative intervention, the existing legal instruments such as the Brussels I Recast and the 2007 Lugano Convention or the Acquired Rights Directive itself do not presently offer a basis for the assumption or creation of an independent jurisdictional category for transfers of undertakings. Surely, in the interests of legal certainty and a proper administration of justice rules providing jurisdiction should have a firm basis in law. As such, although welcome in theory, the idea of an independent jurisdictional category for the transfer of undertakings is, at present, merely pie in the sky. In the absence of legislative intervention, in practice, there exist three options for determining jurisdiction in matters relating to a cross-border transfer of undertaking:

1. subsuming the transfer as a whole under the jurisdictional category for individual employment contracts;
2. subsuming the entire transfer of undertaking under the general rule of *actor sequitur forum rei* or;
3. dividing the transfer of undertaking among several jurisdictional categories depending on the subject matter in dispute.

Within the realm of the existing private international law instruments, all disputes arising from a cross-border transfer of undertaking may possibly be subsumed under the special jurisdictional category for individual employment contracts or under the general rule awarding jurisdiction to the place of domicile of the defendant by mere means of classification. Both the Brussels I Recast and the 2007 Lugano Convention, to a large extent, require an independent denomination without recourse to national law of the legal concepts contained therein. As such, the problem of classification which usually lies therein that different legal systems offer different, sometimes diametrically opposite, classifications is negated. If one were to agree, at a European level, that under the Brussels regime, all claims arising from or related to a cross-border transfer of undertaking are to be classified as arising from an individual contract of employment or that all claims arising from a transfer of undertaking do not equate to the individual contract of employment, these claims would either be subsumed under the jurisdictional category existing for employment contracts or under the general rule

providing jurisdiction to the courts of the place in which the transferee or transferor is domiciled. As outlined above, under the views and theories existing under the conflict of laws the idea of subsuming all claims relating to a transfer of undertaking under a single rule on the applicable law is hardly a novelty. Where it concerns international jurisdiction however, albeit a subject matter that is scarcely discussed, it appears that dividing the transfer of undertaking among several jurisdictional categories depending on the subject matter in dispute is the most commonly proposed solution in claims arising from cross-border transfers of undertakings.[465] Before proceeding to a discussion on the existing Member State rules on jurisdiction,[466] the following paragraph will therefore outline the various claims that may arise in conjunction with a transfer of undertaking.

**4. Claims arising from a transfer of undertaking**

The existing instruments of private international law, such as the Brussels I Recast and the 2007 Lugano Convention, all depart from the premise that the cause of action as an indicator for the subject matter in dispute is an important factor in determining jurisdiction as these instruments, in part, provide different rules of jurisdiction on the basis of subject matter. As outlined above, the allocation of jurisdiction over any dispute arising from a transfer of undertaking is to be assessed, in line with the existing views, on the basis of the claim instituted by the plaintiff. It is this claim that is decisive in determining the issue of international jurisdiction. Several legal claims may arise from a transfer of undertaking. All those directly (or indirectly) affected by the transfer will be able to initiate legal proceedings. This includes a variety of actors such as employees, trade unions, employee representatives, transferee and transferor. A brief, non-exhaustive overview of the claims that may arise from a transfer of undertaking, usually initiated by the employee or his representative(s), is provided below.[467]

[465] See e.g. Laagland, 2011, p. 8-11 ; Veldmaat & van Assendelft de Coningh 2012, p. 24-25 ; Malmberg 2006, p. 392-393.

[466] See below, paragraph 5.

[467] For examples of claims (possibly) arising from a transfer of undertaking see Chapter 2.

*4.1 Transfer of rights and obligations*

By reason of a transfer of undertaking all rights and obligations arising from individual contracts of employment shall automatically transfer to the transferee. On the basis of Article 3(1) subparagraph 1 of the directive 'the transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer shall, by reason of such transfer, be transferred to the transferee.' The transfer is effectuated by operation of law irrespective of the consent of the affected employees: (the rights and obligations stemming from) their employment contract or employment relationship shall transfer to the transferee regardless of their will or acceptance.[468] Unless the Member States have provided otherwise, the employee cannot continue his employment with the transferor by a mere refusal to transfer to the transferee. The purpose of the directive is to safeguard the rights of the employees affected by the transfer of undertaking by enabling them to continue their employment with the transferee under the same terms and conditions as agreed with the transferor. The directive does not provide for the continuance of the employment contract or relationship with the transferor if the employees do not wish to transfer to the transferee or, after the transfer, remain in his employ.[469] In fact, by reason of the transfer the transferor is, in principle, discharged from all obligations towards the employee(s).[470] Still, the affected employees may wish to oppose the transfer of the rights and obligations arising from their employment relationship to the transferee. Their need to challenge the transfer to the transferee is likely to increase in situations where the transfer entails a cross-border component. If the transfer merely involves a foreign transferee the legal, social and economic position of the employee(s) is

[468] See Joined Cases 144 and 145/87 *Harry Berg and Johannes Theodorus Maria Busschers v Ivo Martin Besselsen* [1988] ECR 2559, ECLI:EU:C:1988:236; *Case 324/86 Foreningen af Arbejdsledere i Danmark v Daddy's Dance Hall A/S* [1988] ECR 739, EU:C:1988:72, para. 15.

[469] Joined Cases 144 and 145/87 *Harry Berg and Johannes Theodorus Maria Busschers v Ivo Martin Besselsen* [1988] ECR 2559, ECLI:EU:C:1988:236; para. 12.

[470] This release of the transferor applies unless the Member States have availed themselves of the possibility to provide for joint and several liability of the transferor and the transferee. As per Article 3(1) subparagraph 2 of the Acquired Rights Directive the 'Member States may provide that, after the date of the transfer the transferor and the transferee shall be jointly and severally liable in respect of obligations which arose before the date of transfer from a contract of employment or an employment relationship existing on the date of the transfer.'

unlikely to deteriorate. After all, in those situations the employee is to continue his work as he has done thus far: no change occurs in work, workplace or applicable law(s). Still, an employee may mistrust a foreign transferee and fear for a change in work culture, (social) policies and an overall deterioration of his legal and social position over time, driving him to oppose the transfer of the rights and obligations arising from his employment contract. The need to challenge the transfer of the employment contract or relationship (or even the transfer of undertaking as a whole) will become even more pressing where the transfer of undertaking is accompanied by a simultaneous or subsequent cross-border relocation of the undertaking. In those situations, the employees generally will have little inclination to continue their employment with the transferee.[471] Although this may be different in situations where the transfer occurs in close proximity to national borders such a transfer of undertaking involves a change in workplace, social security and mandatory (employment) law. In addition, the law(s) applicable to the employment contract, collective labour relations and collective labour law(s) could all presumably change.[472] In the abovementioned situations where the employee wishes to challenge the transfer of the rights and obligations stemming from his employment contract or employment relationship he is likely to ask for a declaratory judgment providing that no transfer has taken place in addition to a claim that the transferor is to honour all rights and obligations arising from the employment contract, including providing access to work and payment of salary.[473]

[471] This may be different in situations where the transfer occurs in close proximity to national borders.

[472] In situations where the transfer is accompanied by a cross-border relocation, such a relocation may well involve a substantial change in working conditions to the detriment of the employee, see Chapter 2, paragraph 5.3 and below paragraph 4.4.

[473] In this context it should be noted that the employee might also explicitly object to the transfer of his employment contract or employment relationship while admitting to the validity of the transfer of undertaking as such. However, where the employee decides on his own accord not to continue his employment with the transferee, Article 3(1) of the Acquired Rights Directive does not apply. An idea fundamental to employment law is that an employee is free to choose (the person of) his employer and that he cannot be forced to continue his employment with an employer whom he has not freely chosen. As is clear from the ECJ's judgment in *Katsikas* it is for the Member States to determine the effects of an employees' objection to the transfer of his employment contract or relationship. The directive neither mandates nor precludes the Member States from providing that the employment contract or employment relationship with the transferor should be maintained upon the employees'

Not only does Article 3(1) effectuate a transfer regardless of the will of the affected employees, the same goes for the transferee and transferor. They cannot themselves decide that the transfer of a business, e.g. by merger or acquisition, takes place without a transfer of the employment contracts. From time to time, the transferee will be reluctant to take over the entire workforce. As a result of this reluctance the transferee and transferor might endeavour to structure the acquisition of the undertaking to be transferred in such a way as to avoid application of the Acquired Rights Directive and its national counterparts, e.g. by staging a discontinuance of the undertaking to be transferred. In cases where the employee has been made redundant due to a supposed discontinuance of the business of the transferor, the employee is likely to asks the court for a declaration of law that a transfer has taken place in addition to claiming payment of salary and possible access to work from the transferee.[474]

Disputes based on Article 3(1) of the Acquired Rights Directive or its equivalent in national law are likely to provide a broad array of claims, ranging from a mere declaration of law that a (or no) transfer has taken place to salary claims. More often than not, these claims will be directed at the transferee. However, there are surely situations perceivable in which the transferee or transferor relies on the acquired rights provisions in claims against an employee or an employee representative, e.g. in situations involving the enforcement of a non-compete clause by the transferee.

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objection. As such e.g. German law in § 613a para. 6 BGB (*Der Arbeitnehmer kann dem Übergang des Arbeitsverhältnisses innerhalb eines Monats nach Zugang der Unterrichtung nach Absatz 5 schriftlich widersprechen. Der Widerspruch kann gegenüber dem bisherigen Arbeitgeber oder dem neuen Inhaber erklärt werden*) explicitly provides for a so-called *Widerspruchsrecht,* allowing the employee to remain employed by the transferee if he objects to the transfer of his employment contract. See Joined Cases C-132/91, C-138/91 and C-139/91 *Grigorios Katsikas v Angelos Konstantinidis and Uwe Skreb and Günter Schroll v PCO Stauereibetrieb Paets & Co. Nachfolger GmbH* [1992] ECR I-06577, ECLI:EU:1992:517., para. 33-37 and ruling; Case 324/86 *Foreningen af Arbejdsledere i Danmark v Daddy's Dance Hall A/S* [1988] ECR 739, EU:C:1988:72, para. 16; Hof 's Hertogenbosch 15 April 2014, HD 200.128.946-01, ECLI:NL:GHSHE:2014:1072; For a more detailed discussion of this matter see Chapter 2.

[474] Hof 's Hertogenbosch 4 April 2014, HD 200.105.666-01, JAR 2014/101, ECLI:NL:GHSHE:2014:588.

*4.2 Collective agreements*

Upon a transfer of undertaking, the continuity of terms and conditions agreed in collective agreements is safeguarded to a certain extent. On the basis of Article 3(3) paragraph 1 of the Acquired Rights Directive 'the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement, until the date of termination or expire of the collective agreement or the entry into force or application of another collective agreement.' Employees or their representatives wishing to enforce the observance of terms and conditions stemming from a collective agreement will consequently have to address their claim to the transferee.

The directive allows the Member States to limit the period of observance of a collective agreement up to one year. The implementation of Article 3(3) will therefore differ throughout the Member States. Diverse national rules and regulations, particularly on the extent of preservation of terms and conditions agreed in collective agreements after the transfer, exist. Whereas some Member States allow the collective agreement to be substituted by a similar agreement other provide for a strict compliance with the collective agreements existing on the date of the transfer. Upon a cross-border transfer of undertaking the effects to be given to a collective agreement will therefore largely depend on the applicable law, both to the transfer of undertaking itself and to the collective agreement in dispute.

*4.3 Protection against dismissal*

The aim of the Acquired Rights Directive, which is to safeguard the rights of employees in the event of a change in employer, would be frustrated if the transferor or transferee would be able to dismiss the workforce on the occasion of a transfer of undertaking.[475] As such, Article 4(1) of the Acquired Rights Directive offers the affected employees protection against dismissal by reason of the transfer. Article 4(1) reads:

> "The transfer of the undertaking, business or part of the undertaking or business shall not in itself constitute grounds for dismissal by the

[475] Proposal for a Directive on the harmonisation of the legislation of Member States on the retention of the rights and advantages of employees in the case of mergers, takeovers and amalgamations, COM (74) 351, p. 7.

> transferor or the transferee. This provision shall not stand in the way of dismissals that may take place for economic, technical or organisational reasons entailing changes in the workforce."

Thus, the transfer of undertaking itself, e.g. by means of merger or acquisition, does not constitute grounds for dismissal. The continuance of the employment contract or employment relationship would be endangered if the transferor and transferee could circumvent the provisions of the Acquired Rights Directive and their national counterparts by simply dismissing the workforce. As mentioned above, in paragraph 4.1, it frequently occurs that the transferee is not inclined to take over the (entire) workforce. Consequently, transferee and transferor may seek to structure the transfer in such a way as to exclude the workforce from transferring to the transferee, e.g. by staging a discontinuance of the business to be transferred. Claims for unjust dismissal (usually accompanied by salary claims, claims for dismissal compensation and claims for (re)employment) by reason of the transfer of undertaking represent the vast majority of cases in the area of employment protection and are uniformly initiated by the employees or their representatives.

*4.4 Substantial change in working conditions*

If the contract of employment or the employment relationship is terminated due to a substantial change in working conditions to the detriment of the employee by reason of the transfer, the employer, on the basis of Article 4(2) of the Acquired Rights Directive, is considered to have been responsible for the termination of the employment contract or employment relationship. It is left to the forum state to determine whether the contract of employment, as proposed by the transferee, involves such a substantial change. Once a substantial change to the detriment of the employee has been established, Article 4(2) requires the Member States to provide that the employer is to be considered responsible for the termination.[476]

Where the transfer involves a cross-border transfer of undertaking the employee may wish to terminate his employment contract or relationship on

[476] Case C-399/96 *Europièces SA v Wilfried Sanders and Automotive Industries Holding Company SA* [1998] ECR I- 6965, ECLI:EU:C:1998:532, para. 44.

the grounds that a transfer to the transferee will amount to a substantial change in working conditions to his detriment. The ECJ case law shows that the Acquired Rights Directive does 'not preclude a worker employed by the transferor at the date of the transfer of an undertaking from objecting to the transfer of his contract of employment or employment relationship to the transferee, provided he decides to do so of his own accord.'[477] Surely, a cross-border transfer of undertaking will become more detrimental to an employee if the transfer involves a cross-border relocation. Examples can be found in Dutch case law, which occasionally assumes that the cross-border relocation of the transferred undertaking results in a substantial change to the detriment of the affected employees. In a case before the district court of Tilburg,[478] which involved a transfer of undertaking accompanied by a cross-border relocation to Belgium, the court assumed such a substantial change in working conditions to the detriment of the employee:

> *"Daarbij neemt de kantonrechter niet alleen in aanmerking de voorgenomen aanpassing van de huidige arbeidsvoorwaarden (die immers op termijn aan het Belgische (cao-) systeem zullen moeten worden aangepast) en het gestelde met betrekking tot de niet onaanzienlijke reisduur. Van belang zijn ook de beperkte reiskostencompensatie die wordt geboden (voorlopig slechts voor 1 jaar), het ontbreken van enigerlei (tijdelijke) compensatie voor de reisduur, de te verwachten andere werk- en ploegentijden en de daarmee samenhangende (lagere) toeslagen."*[479]

According to the court, the detriment existed in a change in employment conditions due to the application of Belgian collective agreements over time as well as in the absence of any provisions relating to the increase in travel time (to and from work). In addition, the employees were likely to be subjected to different work and shift times resulting in a difference in remuneration.

[477] Case C-399/96 *Europièces SA v Wilfried Sanders and Automotive Industries Holding Company SA* [1998] ECR I- 6965, ECLI:EU:C:1998:532, para. 44.
[478] Ktr. Tilburg 26 July 2007, *JAR* 2007/259, ECLI:NL:RBBRE:2007:BB7066.
[479] Ktr. Tilburg 26 July 2007, *JAR* 2007/259, ECLI:NL:RBBRE:2007:BB7066, para. 2.25.

By contrast, in a case before the provisional court of Eindhoven[480] which likewise involved a transfer of undertaking accompanied by a cross-border relocation to Belgium, a change in working conditions to the detriment of the employees was not assumed. The employer, SMC BV, within the meaning of the Dutch acquired rights provisions, transferred part of its undertaking to its Belgian subsidiary, SMC NV. The affected employees, who did not wish to continue their employment in Belgium, despite the increase in travel time (to and from work) not being insurmountable, contested the transfer of the rights and obligations arising from their employment contract or relationship to the transferee and claimed (re)employment from the transferor. In their view, the transfer of their employment relationship to the transferee would result in a detrimental change of labour, social and tax conditions. The employees' claim was dismissed as the court did not consider the transfer contrary to (the principles of) good faith and fair dealing.[481]

In summary, an employee or his representatives may upon a cross-border transfer of undertaking institute a claim for a declaration of law (and an accompanying claim for redundancy payments) that the transfer of undertaking involves a substantial change in working conditions to the detriment of the employee causing the employer to be responsible for the termination of the employee, even if the employee, on its own accord, decides not to continue his employment with the transferee.

*4.5 Preservation of status and function employee representatives*

Article 6 (1) of Acquired Rights Directive stipulates that if the transferred undertaking preserves its autonomy, 'the status and function of the representatives or of the representation of the employees affected by the transfer shall be preserved on the same terms and subject to the same conditions as existed before the date of the transfer by virtue of law,

[480] Ktr. Eindhoven (vrz.) 9 September 2008, *JAR* 2008/271, ECLI:NL:KTGEIN:2008:BG3811.

[481] In Dutch; 'redelijkheid en billijkheid'. Notable in this context is that the employees based their claim on the principles of good faith and fair dealing instead of referring to the national acquired rights provisions pertaining to a substantial change in working conditions. In Dutch law: Article 7:665 BW. It is possible that the employees did not base their claim on Article 7:665 BW because they did not want to be considered dismissed as their claim involved a claim for (re)employment with the transferor.

regulation, administrative provision or agreement, provided that the conditions necessary for the constitution of the employees' representation are fulfilled.' As such, the preservation of the status and function of the employee representatives largely depends on the transferred entity preserving its autonomy. According to the ECJ in *UGT-FSP*, a transferred economic entity preserves its autonomy:

> 'provided that the powers granted to those in charge of that entity, within the organisational structures of the transferor, namely the power to organise, relatively freely and independently, the work within that entity in the pursuit of its specific economic activity and, more particularly, the powers to give orders and instructions, to allocate tasks to employees of the entity concerned and to determine the use of assets available to the entity, all without direct intervention from other organisational structures of the employer, remain, within the organisational structures of the transferee, essentially unchanged. The mere change of those ultimately in charge cannot in itself be detrimental to the autonomy of the entity transferred, except where those who have become ultimately in charge have available to them powers which enable them to organise directly the activities of the employees of that entity and therefore to substitute their decision-making within that entity for that of those immediately in charge of the employees.'[482]

Thus, if an economic entity retains its identity, and is transferred in its entirety, the representation of the employees will remain virtually unaffected. In cross-border situations, where the transferred undertaking becomes part of the legal entity of the transferee or where the transfer of undertaking involves a cross-border relocation it may be difficult to ensure a proper preservation of the employee representation as the laws pertaining to employee representation will generally not equate to the laws applying prior to the transfer. However, this not necessarily results in an insurmountable detriment to the employees and their representatives as the Member States are to make every effort 'to ensure that the employees transferred who were represented before the transfer continue to be properly represented during the

[482] Case C-151/09 *Federación de Servicios Públicos de la UGT (UGT-FSP) v Ayuntamiento de La Línea de la Concepción, María del Rosario Vecino Uribe en Ministerio Fiscal* [2010] ECLI:EU:C:2010:452, para. 56.

period necessary for reconstitution or reappointment of the representation of employees in accordance with national law or practice.'[483] Employee representatives losing their status by expire of their term of office as a result of the transfer 'shall continue to enjoy the protection provided by the laws, regulations, administrative provisions or practice of the Member States.'[484] Consequently, claims for the preservation of status and function of employee representatives may be initiated against the transferee by individual employee representatives, trade unions and other employee representative bodies.

*4.6 Information and consultation*

A fundamental social right enshrined in Article 27 of the *Charter of Fundamental Rights of the European Union*[485] is that of the employees' right to information and consultation (which must be guaranteed within the undertaking). According to Article 7 of the Acquired Rights Directive both the transferor and transferee are required to inform the representatives of the affected employees of the date of the transfer, the reasons for the transfer, the legal, economic and social implications of the transfer and any measures envisaged in relation to the employees. The transferor has to inform the employee representatives of the affected undertaking prior to the transfer, whereas the transferee is required to inform the 'representatives of his employees before *his* employees are directly affected by the transfer as regards *their* conditions of work and employment.'[486] Consequently, actions for a failure to comply with information and consultation requirements may be directed, by their respective employees (or their representatives), at both the transferor and the transferee.[487]

*4.7 Concluding remarks*

The above shows that a (cross-border) transfer of undertaking may give rise to a plethora of legal actions instituted by a variety of actors such as the

[483] Article 6(1) Acquired Rights Directive.

[484] Article 6(2) Acquired Rights Directive.

[485] Charter of Fundamental Rights of the European Union, OJ 18.12.2000 C 364/1.

[486] Article 7(1) Acquired Rights Directive.

[487] Some Member States, such as Germany and Austria, impose a common duty on the transferor and transferee to inform the individual employees of the undertaking to be transferred. In those countries actions for a failure to comply with these requirements may be directed at both the transferor and the transferee.

employee, employee representatives, trade unions, transferor and transferee. The majority of these claims are likely to be directed against the transferee, who as the new employer *by operation of law* is required to uphold all rights and obligations arising from a contract of employment or employment relationship with the transferor. Still, the affected employees will often seek to sue both transferee and transferor in composite proceedings, especially in those cases where the *lex causae* allows for the joined liability of transferor and transferee.[488]

**5. Member State jurisdiction**

This paragraph will address the issue of jurisdiction in cases where the plaintiff seeks enforcement of a claim relating to a cross-border transfer of undertaking in the courts of a European Member State. As outlined in the previous Chapter, the present research addresses three types of cross-border transfer scenarios, i.e. the intra-European transfer, the inbound transfer and the outbound transfer.[489] For example, there is the situation where transferee, transferor and the undertaking to be transferred are all governed by and situated in a European Member State, there is the situation where transferee and transferor are, although principally governed by the laws of a non-Member State, situated in a European Member State and there may be situations where the transfer involves a simultaneous relocation to another state, either a Member State or a foreign nation. Where all parties to and effects of a transfer of undertaking are governed by or situated within a single Member State no conflict of jurisdiction will arise. These national transfers of undertakings are therefore, due to their lack of internationality, beyond the scope of the present research.[490]

[488] On the basis of Article 3(2) Acquired Rights Directive the 'Member States may provide that, after the date of the transfer the transferor and the transferee shall be jointly and severally liable in respect of obligations which arose before the date of transfer from a contract of employment or an employment relationship existing on the date of the transfer.' Consequently, the Article limits the claims against the transferor to claims arising from a contract of employment for obligations in existence on the date of the transfer.

[489] See Chapter 2, paragraph 2.

[490] Although both European Member States and Member States of the European Economic Area are to apply the Acquired Rights Directive, there has to be a distinction between the two when it comes to the matter of jurisdiction as the solutions to a conflict of jurisdiction are to be found in different instruments. For the EFTA signatories to the European Economic Area

*5.1 Brussels I Regulation (Recast)*

Within the European Union, the issue of jurisdiction is largely regulated by *Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast)*[491], commonly known as the Brussels I Recast. This Regulation, which applies to legal proceedings instituted as from 10 January 2015,[492] is intended to facilitate legal certainty, a sound administration of justice and a free circulation of judgments throughout the European Union.[493] Serving a dual purpose, the Regulation provides rules on both jurisdiction and the recognition and enforcement of Member State judgments. The Brussels I Recast applies in civil and commercial matters with exception of the issues mentioned in Article 1(2) of the Regulation.[494] As such, it covers a wide variety of matters within the spectrum of private law. The defendant must, in principle[495], be domiciled in a Member State for the Regulation to apply. The nationality of the parties does not form a prerequisite for application. As such, the regulation applies to civil and commercial matters whenever the defendant is domiciled within a Member State, irrespective of the nationality of the parties. The same goes for companies and legal persons: they are considered domiciled in the European Member State where their statutory seat, central administration *or* principal place of business is located.[496] As such, it is possible for the regulation to apply in cases where the defendant is a company governed by the laws of a non-Member State. As per Article 4,

(i.e. Norway, Iceland and Liechtenstein) jurisdiction is governed by the Lugano 2007 Convention. A discussion of this Convention is however beyond the scope of the current research, as is a discussion of the national acquired rights provisions of these countries.

[491] OJ 20.12.2002 L 31/1; The Brussels I Recast is applicable in all 28 European Member States, including Denmark. On 20 December 2012 Denmark notified the Commission of its decision to implement the contents of Regulation (EU) No 1215/2012, see Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters OJ 21.3.2013 L79/4.

[492] As per Article 66 Brussels I Recast.

[493] Preamble 6, 15, 16 Brussels I Recast.

[494] Article 1(1) Brussels I Regulation.

[495] There are a few exceptions to this so-called formal scope of the Regulation, one of which applies to employees and will be discussed below.

[496] Article 63(1) Brussels I Recast.

jurisdiction under the regulation generally follows the time-honoured maxim of *actor sequitur forum rei*, which guards the defendant against being sued in a court outside his domicile.[497] There are only a few distinct exceptions to this basic principle, which are set out in sections 2 to 7 of Chapter II of the regulation.[498] According to the preamble, the situations set forth in sections 2 to 7 require a different connecting factor on the basis of their distinct subject matter or the autonomy of the parties. Where there is a close connection between a specific court and the instituted claim these sections provide (alternative) grounds for jurisdiction.[499] For example, section 5 of the regulation exclusively deals with jurisdiction over individual contracts of employment. Employees, as weaker parties, are deemed to require protection by rules of jurisdiction more favourable to their interest than the general rules.[500]

*5.2 Civil and commercial matters*

In applying the specific provisions of the regulation to determine the matter of jurisdiction, it is imperative to establish whether the cause of action is covered *ratione materiae* by the Brussels I Recast; i.e. whether the issue amounts to a civil and commercial matter within the meaning of Article 1 of the Brussels I Recast. Although in most cases it will be easily established whether a matter constitutes a civil and commercial matter, in some cases such classification will prove more difficult. One of the subject matters where such classification may prove challenging relates to the issue of transfers of undertakings. After all, a transfer inhabits both individual[501] and semi-public[502] components, complicating its classification as a mere civil and commercial matter. It is therefore imperative to establish whether a transfer of undertaking is covered by the substantive scope of the Brussels I Recast. The regulation itself provides neither a definition of the term civil and commercial matters nor a method for its classification; it merely holds 'a

[497] Jenard report 1979, p. 18, 19.
[498] Preamble recital 15, 16. *Cf.* Article 5(1) Brussels I Regulation.
[499] Preamble recital 15, 16. *Cf.* Article 5(1) Brussels I Regulation.
[500] Preamble recital 18 Brussels I.
[501] E.g. the transfer of rights and obligations stemming from the individual employment contract or relationship.
[502] E.g. the preservation of status and function of employee representatives; information and consultation requirements and the *ope legis* transfer to the transferee.

negative stipulation' 'that the nature of the court or tribunal is immaterial'[503] and excludes revenue, customs or administrative matters and *acta iure imperii*. As such, the regulation applies in disputes between a public authority and a private person where the authority is not 'acting in the exercise of public powers'.[504]

In determining whether the cause of action falls within the substantive scope of the Brussels I Recast, classification of such cause of action,[505] as being either a civil and commercial matter or not, is required. The unique problem or conflict of such classification lies therein that various legal orders often offer different classifications.[506] In order to ensure equal and uniform application throughout the Member States the term 'civil and commercial matters' has a meaning that is independent to the regulation.[507] Such independent explanation should generally negate any problem of classification as the term does not hold a reference to the internal law of the Member States.[508] Accordingly, the interpretation of the concept 'civil and

[503] See Opinion Advocate General Ruiz-Jarabo Colomer *Lechouritou* Case C-292/05 [2007] ECR I-01519, ECLI:EU:C:2006:700, para. 20.

[504] Case 29/76 *LTU Lufttransportunternehmen GmbH & Co. KG v Eurocontrol* [1976] ECR 1541, ECLI:EU:C:1976:137, para. 4 and 5; Case 814/79 *Netherlands State v Reinhold Rüffer* [1980] ECR 03807, para. 8, 16; Case C-172/91 *Volker Sonntag v Hans Waidmann, Elisabeth Waidmann en Stefan Waidmann* [1993] ECR I-01963, ECLI:EU:C:1993:144, para. 20-21.

[505] In its traditional meaning the tool of classification, characterization or *qualification* is utilized in determining the applicable law. Classification of a cause of action entails the allocation of a factual situation to the correct legal category, thus ensuring the application of the correct connecting factor and ensuing (applicable) law. In determining whether the cause of action falls within the substantive scope of the Brussels I Regulation, classification of the cause of action (as being either a civil and commercial matter or not) is required.

[506] See for instance Opinion Advocate General Darmon *Marc Rich & Co. AG v Società Italiana Impianti P* Case C-190/89 [1991] ECR I-3855, ECLI:EU:C:1991:58, para. 1, who states that, notwithstanding its inherent complexity, the interpretation of the Brussels Convention raises numerous difficulties due to the use of concepts which are defined differently by the laws of various Member States, resulting in the risk of irreconcilable decisions.

[507] Case 29/76 *LTU Lufttransportunternehmen GmbH & Co. KG v Eurocontrol* [1976] ECR 1541, ECLI:EU:C:1976:137, para. 3.

[508] Case 29/76 *LTU Lufttransportunternehmen GmbH & Co. KG v Eurocontrol* [1976] ECR 1541, ECLI:EU:C:1976:137, para. 3; If no reference to the internal law of the Member States is made, there can be no conflict of classification as there is no longer any significance to the legal orders having diametrically opposite views or offering dissimilar classifications.

commercial matters' should not be dictated by the internal law of the court seised (*lex fori)* or the law that applies to the legal relationship in dispute (*lex causae).*[509] According to the European Court of Justice, it is to be interpreted, first, in light of the 'objectives and scheme'[510] of the regulation and, second, on the basis of the 'general principles which stem from the corpus of national legal systems'.[511] Yet, the ambiguity and lack of direct applicability prevent this proposed methodology from offering an immediate solution to the problem of classification. The latter suggested, comparative approach is reminiscent of the approach proposed by *Rabel*[512] during the classic classification debate and is hampered by the fact that there exist few general principles of universal application.[513] Moreover, since the national laws of the Member States are not all rooted in the same legal tradition, it appears unfeasible to derive any general principles of sufficient meaning in determining whether a cause of action amounts to a civil and commercial matter under the regulation.[514] Although the need for a comparative approach is deeply rooted within private international law,[515] the application of such an approach in defining the concept of civil and commercial matters appears more likely to reveal differences between the laws and classifications of the Member States than it is to resolve them.[516]

Legislative history shows that the term civil and commercial matters, as first included in the 1968 Brussels Convention,[517] although not expressly defined in the convention itself or the *Jenard* report, was originally intended to

[509] Case 29/76 *LTU Lufttransportunternehmen GmbH & Co. KG v. Eurocontrol* [1976] ECR 1541, ECLI:EU:C:1976:137, para. 3; Also See: Hausmann 2011, p. 4; Hausmann 2012, p. 76-77; Geimer 2003, p. 512, 514.
[510] Case 29/76 *LTU Lufttransportunternehmen GmbH & Co. KG v. Eurocontrol* [1976] ECR 1541, ECLI:EU:C:1976:137 para. 3.
[511] ECJ Case 29/76 *LTU Lufttransportunternehmen GmbH & Co. KG v. Eurocontrol* [1976] para. 3.
[512] Rabel 1931, p. 241 *et seq*.
[513] This is true even for the Member States that share on the same legal heritage, such as the Roman tradition.
[514] Rogerson 2012, p. 53; Hausmann 2012, p. 77.
[515] Kalenský 2013, p. 158-157; Basedow 2007; Bogdan 2012, p. 175-177.
[516] See Allarouse 1991, p. 488.
[517] Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, consolidated version *OJ* [1998] C 27/1.

exclude all matters relating to public law. As stated in the *Schlosser* report: 'the distinction between civil and commercial matters on the one hand and matters of public law on the other is well recognized in the legal systems of the original Member States[518] and is, in spite of some important differences, on the whole arrived at on the basis of similar criteria.'[519] However, the dichotomy existing between private and public law, which on the European continent dates back to Roman times, is unknown to common law legal systems.[520] As such, in order to provide additional clarity to the meaning of civil and commercial matters, the negative stipulation that 'revenue, customs or administrative matters' do not amount to civil and commercial matters within the meaning of the convention was added to Article 1(1) Brussels Convention upon the accession of Denmark, Ireland and the United Kingdom to the Brussels Convention.[521] This addition does not, however, (entirely) resolve the problem of classification or help to provide a common understanding of the concept of civil and commercial matters. In practice, the concept of civil and commercial matters is still largely defined by the distinction existing between private and public law.[522] As a general rule, disputes between private individuals, except in matters which are excluded

[518] Belgium, France, Germany, Italy, Luxembourg and the Netherlands, Treaty establishing the European Economic Community, signed in Rome [1957].

[519] P.Schlosser, *Report on the Convention on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice, OJ* [1979] C 59/82.

[520] Hess 2007, p. 34; P. Schlosser, *Report on the Convention on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice* [1979], OJ 5.3.1979 C59/82, para. 23. This dichotomy between civil (private) and public law dates back to Roman times. As per Ulpianus: "*Huius studii duae sunt positiones, publicum et privatum. publicum ius est quod ad statum rei Romanae spectat, privatum quod ad singulorum utilitatem pertinet"*, Inst. 1.1.1, 4; D. 1.1.1.2.

[521] Article 3 Convention of 9 October 1978 on the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland signed in Brussels on 9 October 1978 (78/884/EEC); Schlosser report 1979, *OJ* [1979] C 59/82; Rogerson 2012, p. 51.

[522] This is clear from the case law of the European Court of Justice in: and the 2007 Heidelberg report, p.34.

on the basis of subject matter,[523] fall within the ambit of the regulation. In addition, it is settled case law that disputes between a public authority and a private individual are outwith the scope of the Brussels I Recast and its predecessors, insofar as the public authority is acting in the exercise of public powers.[524] Where a government body or state authority is party to legal proceedings the subject matter of the action must not concern (liability for)[525] the exercise of public powers where these derogate from the rules of law applicable to relations between private individuals.[526] Hence, the private nature of the legal relationship existing between the parties is a decisive factor in classifying a dispute as a civil and commercial matter under the regulation. Thus, disputes between private individuals and state authorities acting in a private capacity amount to civil and commercial matters within the meaning of the regulation.

Admittedly, the classification of a cause of action as being either a civil and commercial matter or not will rarely pose any problems. Whether a cause of action amounts to a civil and commercial matter will generally be easily determined and straight-forward. Still, problems of classification are likely to occur in disputes that border on public law. When it comes to claims related to a transfer of undertaking the applicability of the Brussels I Regulation and its various rules on jurisdiction is largely contingent on the nature of the instituted claim. For some matters regulated by the Acquired

[523] Recital 10 of the Regulation makes clear that the substantive scope of application is to 'cover all the main civil and commercial matters apart from certain well-defined matters. Recital 10 highlights the exclusion of maintenance obligations which are beyond the scope of the Brussels I Recast due to the adoption of *Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations*, *OJ* 10.1.2009, L7/1

[524] Case 29/76 LTU Lufttransportunternehmen GmbH & Co. KG v. Eurocontrol [1976] ECR 1541, ECLI:EU:C:1976:137, operative part, para. 2; Case 814/79 *Netherlands State v Reinhold Rüffer* [1980] ECR 03807 operative part; Case C-172/91 *Sonntag* [1993] ECR 1-1963, para. 20; Case C-167/00 *Verein für Konsumenteninformation v. Karl Heinz Henkel*, [2002] ECR I-8111, ECLI:EU:C:2002:555, para. 26.

[525] See e.g. C-292/05 *Lechouritou* [2007] ECR I-01519, ECLI:EU:C:2007:102 in which the ECJ held that the plaintiffs could not seek damages for crimes committed against them or their ancestors during World War II under the Brussels I Regulation as 'operations conducted by armed forces are one of the characteristic emanations of State sovereignty'.

[526] Case C-167/00 *Verein für Konsumenteninformation v. Karl Heinz Henkel*, [2002] ECR I-8111, ECLI:EU:C:2002:555, para. 30.

Rights Directive it will be easy to determine whether they amount to a civil and commercial matter under the regulation, whereas with regard to other matters this might prove more difficult. As such, claims based on a false dismissal will undoubtedly be classified as a civil and commercial matter whereas claims based on the employer's failure to preserve the status and function of employee representatives may show more difficult to classify. With regard to the latter issue the problem of classification can be depicted by a report provided by the CMS Group for the European Commission. The report states:

> "As to the effect of a cross-border transfer on the status and function of employee representatives of the business transferred, it must be established whether in the country of the transferor, State A, employee representation is a "civil and commercial matter" within the meaning of the Regulation (art 1(1)) (…). This is the case in countries where the information and consultation obligations can be enforced before the employment courts (e.g. Austria, the Netherlands, Italy)."[527]

The idea that it is for the Member States to determine whether the preservation of the status and function of employee representatives upon a transfer of undertaking (or any other acquired right) amounts to a civil and commercial matter under the Brussels I Recast suggests little understanding of this private international law instrument and its approach to classification. As outlined above, the definition of civil and commercial matters under the regulation requires an independent or autonomous interpretation without redress to national law.[528] Thus, it is for the court taking cognizance of the matter to determine, by reference 'to the objectives and scheme of the regulation, to the general principles which stem from the corpus of the national legal systems' and in line with the case law provided by the European Court of Justice, whether the preservation of the status and function of employee representatives upon a transfer of undertaking is covered *ratione materiae* by the Brussels I Recast. It is for the forum to decide whether the abstract cause of action qualifies as a civil and commercial matter. The national law and perceptions of the state where the

[527] CMS report 2006, p. 59.

[528] See *e.g.* Case 29/76 *LTU Lufttransportunternehmen GmbH & Co. KG v. Eurocontrol* [1976] ECR 1541, ECLI:EU:C:1976:137, para. 3.

undertaking to be transferred is located, as a possible *lex causae,* should not be featured in this consideration. It is to be considered whether the preservation of the status and function of employee representatives as a general cause of action, irrespective of e.g. the views existing in *lex fori* or the *lex causae,* amounts to a civil and commercial matter. Contrary to what appears to be suggested in the CMS report, the nature of the court or tribunal deciding on the matter is also irrelevant to this consideration.[529] Application of the Brussels I Recast is not barred by the public nature that, in some Member States, is awarded to employee representation and other matters of collective labour law. In situations where a private entity, such as an employee representative or an employee representative body (e.g. a works council or trade union) seeks enforcement of national acquired rights provisions these claims are likely to fall within the concept of civil and commercial matters as they (mainly) involve the enforcement of private law rules. Surely, the provisions of the Acquired Rights Directive are largely aimed at protecting the individual employee.[530] The central purpose of the provision effecting the automatic transfer of the employment relationship to the transferee is to secure that individual employees are protected against the loss of employment.[531] Ensuring a continuance of the legal position of the employee, in the sense that his position is not adversely affected by the transfer of undertaking, requires the transfer of the rights and obligations stemming from collective as well as individual labour laws or provisions. As such, the directive ensures, among others, the continuance of terms and conditions established in collective bargaining agreements and the preservation of the status and function of employee representatives.[532] The

[529] Article 1(1) Brussels I Recast.

[530] BAG 29 October 1992 – 2 AZR 267/92, para. IV 2 a; also see BAG 24 August 1989, *IPRax* 1991, 407. This judgment, which mainly deals with the classification of the national (German) acquired rights provision, para. 613a BGB, under the conflict of laws has been strongly criticised in legal literature. Some authors applaud the denial of overriding effect in view of the interests that the provision aims to protect, whereas others profusely disagree with the decision. They opine that provisions protecting employees often originate from public interests, which makes these provisions particularly suitable for application as overriding mandatory rules.

[531] BAG 29 October 1992 – 2 AZR 267/92, para. IV 2 a; also see BAG 24 August 1989, *IPRax* 1991, 407; COM (74) 351 final/2, p. 3, 6.

[532] COM (74) 351 final/2, p.6: It should be noted that the directive does not provide for an automatic transfer of all rights and obligations stemming from collective agreements. Where

directive seeks to secure that those required to protect the interest of the employees vis-à-vis the employer are able to continue their work after the transfer has been completed. In addition, those employees who as representatives enjoy a certain protection under the laws, regulations, administrative provisions or practice of the Member States have a right to the continuance of this protection even if, as a result of the transfer, their position as an employee representative cannot be maintained.[533]

The above shows that the provisions of the Acquired Rights Directive and their national counterparts are mainly based in private law and founded in private interests. Still, it may be argued that provisions aiming to protect employees often originate from a public interest or embody some form of public policy. In that sense, claims based in public interests made by private parties, such as employee representatives or employee representative bodies, could (hypothetically) be excluded from the substantive scope of the Brussels I Recast.[534] However, the Brussels I Recast and the interpretation given to the concept of civil and commercial matters by the European Court of Justice leave very little room for a derogation from the perception that claims between private parties are generally covered by the regulation: only in situations where a private party seeks to exercise rights or powers that are beyond the rules applicable to relations between private individuals will it be possible for such disputes to be excluded from the scope of the regulation.[535]

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the transferor has concluded or established a collective bargaining agreement designed specifically for the business or undertakings to be transferred it seems only logical that the transferee is obliged to continue the rights and obligations existing under such agreement. Yet, in situations where collective agreements have been concluded between various (workers and employers) associations, which are not binding on the transferee and have not been declared generally binding the tight of free association prevents the transferee from being obliged to uphold the terms and conditions stemming from these agreements. As such, the directive, in Article 3(2) imposes on the transferee the obligation to observe the terms and conditions agreed in collective agreements on the same terms applicable to the transferor under that agreement until such time as the agreement expires or a new agreement enters into force. For more on the preservation of terms and conditions agreed in collective bargaining agreements see Chapter 2, paragraph 6.

[533] Article 5(2) Acquired Rights Directive.

[534] *Cf.* Van Hoek & Hendrickx 2009, p. 8.

[535] Case C-265/02 *Frahuil SA v Assitalia SpA*, [2004] ECR I-01543, ECLI:EU:C:2004:77, para. 21; Case C-266/01, *Préservatrice foncière TIARD SA v Staat der Nederlanden*, [2003] ECR I-04867, ECLI:EU:C:2003:282, para. 36.

In other words, disputes concerning private parties can only escape application of the Brussels I Recast when the plaintiff seeks to enforce certain rules or rights that are strongly based in public law and go beyond the private legal relationship, examples of which are hard to come by.[536] The mere fact that the plaintiff acts as an employee representative or employee representative body does not disqualify the dispute from being classified as a civil and commercial matter.[537] Moreover, claims relating to specific issues of collective labour law, such as e.g. rights and obligations stemming from a collective agreement, are not excluded *per se* from the substantive scope of the regulation.[538] Generally, such claims do not pertain to the exercise of public powers and are thus covered by Article 1(1) of the Brussels I Recast.[539] Yet, where it concerns claims specifically relating to issues of employment representation there appears to be some discussion, especially in German legal literature, as to whether these claims amount to a civil and commercial matter within the meaning of Article 1(1).[540] The fact that these claims, similar to the majority of claims in the area of collective labour law, do not concern the exercise of public powers or authority speaks in favour of their classification as civil and commercial matters.[541] However, one may contend that the issue of employment representation is at odds with the intention of the Brussels I Recast, which seeks to allot jurisdiction in disputes involving parties between whom a direct legal relationship exists. As such, it is argued that by its very nature, being one of third party representation, the issue of employment representation cannot be placed

[536] *Cf.* Van Hoek & Hendrickx 2009, p. 8.

[537] The same applies to consumer representation: Green Paper on Consumer Collective Redress COM(2008) 794 final, p.13-14.

[538] *Cf.* BAG 15 February 2012 - 10 AZR 711/10; Schömann *et al.* 2012, p. 226; Eichhorst *et al.* 2011, p. 73.

[539] Case C-420/07 *Meletis Apostolides v David Charles Orams en Linda Elizabeth Orams* [2009] ECR I-3571, ECLI:EU:C:2009:271 para. 43, 44, 45.

[540] Thus the idea portrayed in the CMS report (cited above) that there is some uncertainty as to whether claims relating to employee representation are considered civil and commercial matters does have some merit. Yet, the uncertain position of these claims is not based on the reasons provided in the report.

[541] Geimer/Schütze EuZVR 3. Aufl. 2010 A 1 Art. 1 Note 71; LAG Berlin-Brandenburg 8 February 2011 - 7 TaBV 2744/10.

within the strait-jacket that is the Brussels I Recast.[542] Yet, this argument does not prove cogent given the fact that the Brussels I Recast does not prevent (employee) representatives from acting as a plaintiff nor is this a decisive factor in determining the substantive scope of the Regulation.[543] Any claim by a private individual or entity aimed at the enforcement of rules and obligations based in private law against another private individual will under the Brussels I Recast be classified as a civil and commercial matter.[544] In situations where an individual employee, upon a transfer of undertaking, seeks to ensure the preservation of his status and function as an employee representative this criterion is undoubtedly met. Moreover, there exists a direct legal relationship between the employee and the transferor: being the employee-employer relationship. The transferee, due to the transfer regarded as the employer *ab initio*, is required to preserve the status and function of the employee representatives on the basis of the acquired rights provisions. He is merely obliged to ensure the continuance of the position of the employment representatives and cannot afford them a position that they are not entitled to under the laws, regulations, administrative provisions or practice of the Member States. As such, he is not exercising public powers by endeavouring to preserve the status and function of the employee representatives, whether they are individual employees or employment representative bodies.

In summary, all claims arising from or related to a cross-border transfer of undertaking are covered *ratione materiae* by the Brussels I Regulation, as long as they do not pertain to the exercise of public powers. As all actors, such as the employees, employee representatives, transferor and transferee, who possibly have a claim relating to a cross-border transfer of undertaking are likely to be private individuals or private entities these claims are generally classified as civil and commercial matters within the meaning of Article 1(1) Brussels I Recast.

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[542] LAG Berlin-Brandenburg 8 February 2011 - 7 TaBV 2744/10; ArbG Cottbus 29 November 2010 - 4 BV 86/10; *Cf.* OGH Wien, 2 June 2009 - 9 ObA 144/08d.

[543] The same applies to consumer representation: Green Paper on Consumer Collective Redress COM(2008) 794 final, p.13-14; Van Hoek & Hendrickx 2009, p. 6.

[544] Van Hoek & Hendrickx 2009, p. 6, 9.

*5.3 General rule*

As a general rule jurisdiction under the Brussels I Recast follows the time-honoured maxim of *actor sequitur forum rei*, which guards the defendant against being sued in a court outside his domicile.[545] Thus, on the basis of Article 4 of the regulation, jurisdiction is commonly awarded to the courts of the Member State in which the defendant is domiciled, irrespective of the nature or subject matter of the claim instituted against him.[546] For reasons of legal certainty and because it makes it easier for the defendant to provide a proper defense, the place of the defendant´s domicile embodies the most natural forum.[547] However, the Brussels I Recast does not directly allot jurisdiction to the courts of the *place* of domicile of the defendant; it merely grants jurisdiction to the courts of the Member State in which the defendant is domiciled. It is left to the rules on the internal jurisdiction of that Member State to determine which court is to take cognizance of the dispute.[548]

Article 4 Brussels I Recast does not itself provide a definition of the concept of domicile: specific rules on the notion of domicile for natural and legal persons are provided in Articles 62 and 63 of the Brussels I Recast.[549] As per Article 62(1) the Member State court seised of the matter is to apply its internal law, i.e. the *lex fori,* in order to determine whether a natural person, as a defendant, is domiciled in that Member State. If the court determines that the defendant is not domiciled within the forum state, it must apply the laws of another Member State in order to determine whether the defendant is domiciled within that specific Member State.[550] Whereas the regulation leaves the definition of domicile for natural persons to the national laws of the Member States, it provides an autonomous definition of domicile for legal persons. Article 63(1) Brussels I Recast provides that the domicile of a

[545] Jenard report 1979, p. 18, 19.

[546] Preamble Recital 15 Brussels I Recast.

[547] Case C-412/98 *Group Josi Reinsurance Company SA v. Universal General Insurance Company (UGIC)* [2000] ECR I-5925, ECLI:EU:C:2000:399, para. 35; Case C-26/91 *Handte v Traitements Mécano-chimiques des Surfaces* [1992] ECR I-3967, ECLI:EU:C:1992:268, para. 14; Jenard report 1979, p. 18.

[548] Jenard report 1979, p. 18, 19; Magnus & Mankowski 2007, p.71. In most countries, the court awarded jurisdiction on the basis of the rules on internal jurisdiction will be the court of the place of domicile of the defendant.

[549] These provisions equate to Articles 59 and 60 of the Brussels I Regulation.

[550] Article 62(2) Brussels I Recast.

company or other legal person can alternatively be based on the place where the company has its statutory seat, central administration or principal place of business. As such, the regulation tailors to the differences in private international law (systems) pertaining to companies that exist within the European Member States.[551]

The nationality of the parties or state of incorporation of a company, whether plaintiff or defendant, does not have any effect on the application of the Brussels I Recast. Where it concerns the defendant, Article 4(1) specifies that 'persons domiciled in a Member State shall, *whatever their nationality*, be sued in the courts of that Member State.' As such, the regulation applies to civil and commercial matters whenever the defendant is domiciled within a Member State, irrespective of the nationality of the parties. Thus, it is possible for the regulation to apply in disputes against a third state national or a company governed by the laws of a non-Member State. With respect to the transfer of undertaking, the employees or their representatives will therefore be able to sue a non-EU incorporated transferee or transferor in the courts of a Member State on the basis of the Brussels I Recast, if the transferee's or transferor's principal place of business or central administration is located within a Member State.[552] The same holds true in disputes initiated by the transferor or transferee, they will, on the basis of the general rule awarding jurisdiction to the *forum rei,* be able to present their claim against a third state national employee or employee representative in a Member State court whenever the employee is domiciled within the territory of the forum state.

Jurisdiction pertaining to those who are not considered domiciled in a Member State under the regulation is determined in accordance with the national laws of the Member States.[553] Thus, it is for the national rules on jurisdiction of the forum state to decide whether the court seised of the matter has jurisdiction over those domiciled in a third state. As such, e.g. companies having their main establishment outside the European Union

[551] According to the Preamble Recital 15 Brussels I Recast: 'the domicile of a legal person must be defined autonomously so as to make the common rules more transparent and avoid conflicts of jurisdiction.'; Van Hoek & Hendrickx 2009, p. 45.
[552] Article 63(1) Brussels I Recast.
[553] Article 6(1) Brussels I Recast.

cannot be sued on the basis of the Brussels I Recast. In case of a cross-border transfer of undertaking this may prove particularly burdensome, where the transferee, taking over (part of) a European based undertaking, has its main establishment outside the European Union. The transferee, as a third state legal entity, may operate several establishments which do not possess separate legal personality, including the undertaking that is transferred, in the European Union. In those cases, the employees or their representatives cannot rely on the general rule of jurisdiction provided by the Brussels I Recast. Yet, in cases where the transfer related dispute is founded in the individual contract of employment the regulation, in Article 20(2), offers a solution:

> 'Where an employee enters into an individual contract of employment with an employer who is not domiciled in a Member State but has a branch, agency or other establishment in one of the Member States, the employer shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that Member State.'

Thus, those employees whose transfer related claim is based in the individual contract of employment or whose claim, under the Brussels I Recast, is classified as one pertaining to an individual contract of employment can sue the transferee in the courts of the place where the transferred undertaking is located, irrespective of the location of the transferee's statutory seat, central administration or principal place of business. For example, if an American company having is primary establishment in the United States of America takes over (part of) an undertaking based in the Netherlands, resulting in the transferred undertaking becoming part of the transferee's legal entity, the employees (or their representatives), in disputes pertaining to the transfer of undertaking, will not be able to sue the transferee on the basis of the general rules provided in the Brussels I Recast as the American company does not have its statutory seat, central administration or principal place of business within a Member State. Nevertheless, employees wishing to sue the transferee for issues (which are to be classified as) relating to their individual contract of employment, e.g. claims relating to (the continuity of) rights and obligations stemming from the employment contract or relationship such as salary, pension and work claims and claims for unfair dismissal, will be able to sue

the American transferee in the Dutch courts on the basis of Article 20(2). Indeed, claims relating to the transfer of undertaking will most likely constitute 'disputes arising out of a branch, agency or other establishment', causing the transferee to be deemed domiciled in the Member State of the transferred undertaking. However well this solution may work for claims pertaining to the individual contract of employment, the Brussels I Recast does not provide a fictitious European domicile in cases of employee representation, disputes relating to a failure to comply with collective information and consultation requirements and disputes relating to collective (bargaining) agreements. In those cases, the employees and their representatives can only rely on the national rules on jurisdiction of the Member States. In this context, the fact that the Brussels I Recast does not cover the abovementioned claims against non EU-domiciled defendants having a secondary place of establishment within a European Member State, does not necessarily prevent a Member State court from assuming jurisdiction over such claims. Although differences exist in conditions, legal basis and scope, most Member States, in their national laws on jurisdiction, provide a jurisdictional basis in case of the presence of a secondary establishment within their territory.[554] Similar to Article 7(5) Brussels I Recast,[555] the majority of Member States restrict jurisdiction in such cases to disputes arising out of the operations of the branch, agency or other establishment.[556] As such, under the national laws pertaining to jurisdiction existing in the Member States, the employees and employee representatives will generally be able to sue a non-EU domiciled transferee who has acquired an EU based (part of an) undertaking, in the courts of the European Member State in which the transferred undertaking is located, insofar as the dispute pertains to the operations of the transferred undertaking.

[554] Nuyts *et al.* 2007, p. 36-37. The study shows that of the European Member States, Poland and Greece do not extent jurisdiction to the place of secondary establishment. In the majority of the Member States the jurisdiction of the court seems to be restricted to 'operations arising out of the secondary establishment, whereas the Czech Republic, England, Finland, Malta and Portugal do not provide such restrictions, see p. 37.

[555] Article 7(5) Brussels I Recast, which equates to Article 5(5) Brussels I Regulation reads: 'A person domiciled in a Member State may be sued in another Member State: as regards a dispute arising out of the operations of a branch, agency or other establishment, in the courts for the place where the branch, agency or other establishment is situated'.

[556] Nuyts *et al.* 2007, p. 36-37.

Whereas the employees and employee representatives, in cases that are beyond the scope of the individual employment contract, will have trouble suing a non EU-domiciled transferee on the basis of the Brussels I Recast, transferor and transferee will encounter similar problems in trying to sue an employee that is domiciled outside the European Union. In fact, where transferor and transferee have employed a non-EU domiciled employee, they will, in transfer related disputes, be unable to sue the employee on the basis of the Brussels I Recast. While employees, as socially and economically weaker parties, when acting as plaintiffs, are provided with additional rules of jurisdiction that apply irrespective of the defendant's domicile, transferee and transferor are bound by the general rule awarding jurisdiction to the *forum rei.*[557] The lack of a unitary definition of the concept of domicile for natural persons causes the existence of a certain divergence throughout the Member States of when a person is considered domiciled within a certain territory. Some Member States equate the concept of domicile to habitual residence or place of stay whereas others apply a more strict concept of domicile. As such, whether a person is deemed domiciled outside the European Union may differ according to the laws of the Member States.

There are only a few distinct exceptions to the general rule, which are set out in sections 2 to 7 of Chapter II of the regulation.[558] This includes section 5, which deals with individual contract of employment.

*5.4 Disputes arising out of the operations of a branch, agency or other establishment*

On the basis of the general rule provided in Article 4, in cases relating to a cross-border transfer of undertaking, the transferee and the transferor may be sued in the courts of the place where they have established their domicile in accordance with Article 63 Brussels I Recast. As such, these legal entities may be sued in the courts of the place where they have their statutory seat, central administration or principal place of business. As outlined above, the

[557] Even where it concerns the individual contract of employment, as is most likely the case in situations where transferee or transferor wishes to sue an employee or employee representative for reasons relating to the transfer of undertaking, Article 22(1) Brussels I Recast reiterates the general rule: 'An employer may bring proceedings only in the courts of the Member State in which the employee is domiciled.' For more on this see paragraph 2.4.

[558] Preamble recital 15, 16. *Cf.* Article 5(1) Brussels I Recast.

place of domicile of transferee and transferor may on occasion not coincide with the location of the transferred undertaking, especially in situations where their business is structured as a group of undertakings operating within one legal entity. In such cases, where the transferred undertaking is to be classified as a secondary establishment within the legal entity of the transferor or transferee, Article 7(5) provides for jurisdiction at the location of the transferred undertaking. In other words, Article 7(5) Brussels I Recast provides for alternative jurisdiction in the courts of the place where a branch, agency or other establishment is situated, insofar as the dispute arises out of the operations of this branch agency or other establishment. Thus, in order for a Member State court to assume jurisdiction at the place of secondary establishment the dispute should relate to the operation of that secondary establishment. In situations where the dispute stems from or is related to a cross-border transfer of undertaking the dispute may relate to the transferred undertaking as a branch, agency or other establishment. However, if the dispute does not relate to the branch, agency or other establishment, but to e.g. the primary establishment, the plaintiffs should avail themselves of the general rule provided in Article 4.

The effects of a transfer of undertaking are not limited the individual employment relationship, but also concern operational, economic and collective employment interests. These rights and interests, such as employee participation rights cannot be subsumed under the special rules of jurisdiction existing for disputes relating to individual employment contracts. Of the transfer related claims that do not stem from the individual contract of employment, claims relating to the preservation of the status and function of employee representatives as well as claims relating to collective information and consultation requirements could possibly be subsumed under Article 7(5).[559] In situations where the transferred undertaking constitutes a branch, agency or other establishment, disputes of employment representation could be classified as disputes arising out of the operation of the transferred undertaking. In this sense, both claims for the preservation of the status and function of employee representatives, whether instituted by the employee representatives or trade unions and claims relating to the information and

[559] See the paragraph on individual employment contracts for a more elaborate portrayal of claims classified as related to individual employment contracts.

consultation of employee representatives constitute disputes of employment representation. The employee representatives, on the basis of their distinct legal position possess a right to the preservation of their status and function by the transferee. Similarly, their distinct position as employee representatives provides them with a right of information and consultation upon a transfer of undertaking. In the majority of situations, the plaintiffs in these cases would have to make due with the general rule on jurisdiction pertained in Article 4 providing jurisdiction to the courts in the place of domicile of the transferee or transferor. However, where the transferred undertaking, due to the transfer has become a part of the legal entity of the transferee situated outside the transferee's place of domicile Article 7(5) allows the employee representatives to present their claim in the courts of the place where the transferred undertaking is situated. Similarly, in situations where the transferred undertaking, prior to the transfer constituted a secondary establishment of the transferor, the employees could by reason of Article 7(5) Brussels I Recast be able to pursue their claim against the transferor in the courts of the place where the transferred undertaking is situated prior to the transfer.

As outlined above, if the (transferred) undertaking is to be considered a secondary establishment the employee representatives, the employee representative body and trade unions will be able to pursue their claim against transferee or transferor before the courts of the place where the (transferred) undertaking is situated. This court will only have jurisdiction if the transferred 'economic entity' can be considered a 'branch, agency or other establishment'. These concepts are to be given an autonomous meaning within the realm of the Brussels I Recast. To this end, case law suggests that a 'branch, agency or other establishment' 'implies a place of business which has the appearance of permanency, such as the extension of a parent body, has management and is materially equipped to negotiate business with third parties to the extent that the latter, although knowing that there will if necessary be a legal link with the parent body, the head office of which is abroad, do not have to deal directly with such parent body but may transact business at the place of business constituting the extension.'[560]

[560] Case 33/78, *Somafer SA v Saar-Ferngas AG* [1978] ECR 2183, ECLI:EU:C:1978:205, para. 12.

Article 7(5) Brussels I Recast only requires application if the claim concerning the *operations* of the branch, agency or other establishment. Examples of such claims are claims regarding 'the situation of the building where such entity is established or the local engagement of staff to work there.'[561] Although claims concerning the status and function of employee representatives appear to logically befall this category, the question may arise whether the notion of 'operations' can be stretched to such an extent that it includes typical (collective) employment interests such as the preservation of the status and function of employee representatives. On a broader note however, the rights and obligations of employee representatives in the event of a transfer of undertaking stem from the operational decision to transfer or acquire the undertaking in which the specific employee representative is engaged. If succumbing the notion that it stretches too far to include collective employment interests in Article 7(5) due to the operation of an undertaking not including the undertaking's decisions vis-à-vis specific employees and their representatives, the employee's, employee representatives and trade unions in these cases will have to resort to Article 4. In light of Article 20(2) Brussels I Recast, however, this notion does not appear to have much merit, as under this provision disputes over individual employment rights may potentially be classified as disputes arising from the operation of a branch, agency or other establishment.

5.5 *Individual employment contract*

As mentioned in paragraph 1, an employee may wish to initiate legal proceedings against either the transferor or the transferee for a variety of reasons ranging from unfair dismissal to a failure to comply with information and consultation requirements. This paragraph seeks to discuss issues of jurisdiction in situations where the claim related to or originating from the cross-border transfer of undertaking is rooted in (or classified as pertaining to) the individual contract of employment. First, the situation where the employee or his representative, upon a cross-border transfer of undertaking, seeks to initiate legal proceedings against the transferor or transferee in the courts of a European Member State will be addressed, after which attention is paid to the reverse situation, i.e. the claims initiated

[561] Case 33/78, *Somafer SA v Saar-Ferngas AG* [1978] ECR 2183, ECLI:EU:C:1978:205, para. 13.

against the employee by the transferee or transferor. Employees may seek enforcement of several articles of the Acquired Rights Directive (and their equivalent in national law) by initiating legal proceedings against the transferor or the transferee. Claims based on some of these Articles may result in actions which are to be classified as matters relating to individual contracts of employment under the Brussels I Recast. Such actions may involve the continuity of contractual rights and obligations (Article 3(1) Acquired Rights Directive), protection against dismissal (Article 4(1) Acquired Rights Directive), a substantial change in working conditions (Article 4(2) Acquired Rights Directive) and information and consultation requirements (Article 7 Acquired Rights Directive).[562]

*5.5.1 Claims initiated by the employee*

In derogation from the general rules, section 5 of the Brussels I Recast provides rules of special jurisdiction in disputes relating to the individual contract of employment.[563] In addition to the *forum rei,* the employee is entitled to sue the employer in the court of the place (from) where he habitually carries out his work or the place of business through which he was engaged. On the basis of Article 21(1) Brussels I Recast an employer, being either the transferor or the transferee, may thus be sued:

a. in the courts of the Member State in which he is domiciled; or
b. in another Member State:
   (i) in the courts for the place where or from where the employee habitually carries out his work or in the courts for the last place where he did so; or
   (ii) if the employee does not or did not habitually carry out his work in any one country, in the courts for the place where

[562] The issue of classification as individual employment matters is dealt with more elaborately below, e.g. there is some question as to the applicability of section 5 of the Brussels I Recast with regards to information and consultation requirements.

[563] The inclusion of a special section on jursdiction in employment matters is fairly recent: it was first introduced at the inception of the Brussels I Regulation. Under the Brussels Convention jurisdiction in matters relating to employment contracts was dealt with according to the general rules on contract.

> the business which engaged the employee is or was situated.[564]

This section utilizes an extended concept of domicile in the sense that per Article 20(2) employers domiciled outside the European Union are deemed domiciled in a Member State if they operate a branch, agency or other establishment within that Member State and the dispute arises out of the operations of the secondary establishment, i.e. the aforementioned branch, agency or other establishment.[565] As outlined above, in paragraph 4, in proceedings relating to the individual contract of employment the extension of the concept of domicile in Article 20(2) enables employees to bring proceedings before the courts of a Member State against an employer domiciled outside the European Union if the employer has a secondary establishment within that Member State. As an inevitable result of economic globalization, the increase of situations in which an employer is domiciled outside the combined territory of the European Member States created a need for predictable and uniform European rules on jurisdiction preventing the employee having to resort to the Member States' national rules on jurisdiction relating to non-EU domiciled employers. In the absence of communal rules, the employee would have to resort to the national rules on jurisdiction existing in the Member States, which might result in an inability to sue a non-EU domiciled employer in the European Union. In order to properly protect the employee as a weaker contractual and economic party the extended notion of employer's domicile was thus included in the Brussels I Regulation, the predecessor of the Brussels I Recast.[566] As such, Article 20(2) enables employees to, in disputes relating to a transfer of undertaking, sue a non-EU domiciled transferee in the courts of the Member State where the transferred undertaking is located, if by reason of the transfer the transferred undertaking has become a dependent branch or establishment. For example, as discussed above in paragraph 4, if an American company having is primary establishment in the United States of America acquires (part of) an undertaking based in the Netherlands, resulting in the transferred undertaking becoming part of the transferee's legal entity, the employees (or

[564] Article 21(1) Brussels I Recast.
[565] *Cf.* Article 7(5) Brussels I Recast.
[566] Magnus & Mankowski 2007, p. 330.

their representatives), in disputes relating to the transfer of undertaking, will thus be able to sue the transferee in the Dutch courts whenever their claim is based on the individual contract of employment or classified as such. Likewise, employees that are part of a dependent branch operated by a transferor that is domiciled outside the European Union will be able to sue the transferor, for reasons relating to the transfer of said branch, in the courts of the Member State where the branch is located.

The employee, as a plaintiff, will surely seek to bring proceedings in a court that, from his position, offers the most advantageous solution to the dispute. Since it is left to the plaintiff to decide in which court to enter his claim, the existence of a plurality of jurisdictional bases will serve to his benefit. A comparison between the Brussels regime and the national rules on jurisdiction existing in the Member States shows that the latter on occasion provide more and alternative bases for jurisdiction in employment disputes. The additional or alternative fora include the place where the employee is domiciled or has his habitual residence,[567] the place where the employment contract was made or signed,[568] the place of citizenship of the parties,[569] and the place where the remuneration is or should have been paid.[570] As such, the question may be raised as to whether the inclusion of an extended concept of domicile for non-EU employers in the Brussels I Recast serves to the benefit of the individual employee. In fact, it can be argued that although the inclusion of an extended concept of domicile for non-EU domiciled employers with a secondary or ancillary establishment in the European Union is intended to provide legal certainty and protect employees as weaker parties, the inclusion actually results in the employees having obtained a position worse than the one that exists for non-protected plaintiffs.[571] Surely, if the employees were not provided with jurisdictional protection due to their weaker legal, social and contractual position they would not be able to sue a third state employer with a secondary establishment in the EU on the basis of the Brussels I Recast. On the basis of Article 6(1) Brussels I Recast, they

[567] Austria, Estonia, Latvia, the Netherlands, Romania, Slovakia and Sweden, as per Nuyts *et al.* 2007, p. 46.
[568] Finland, France, Greece and Spain, as as per Nuyts *et al.* 2007, p. 46.
[569] Spain, Nuyts *et al.* 2007, p. 46.
[570] Austria, as per Nuyts *et al.* 2007, p. 46.
[571] See e.g. Grusic 2012, p. 119.

would have to resort to the rules on residual jurisdiction existing in the Member States and thus have recourse to the additional national bases for jurisdiction. The use of a specific notion of domicile for employers secures that the employee is at all times able to sue a non-EU domiciliary with ancillary establishments in the EU in the courts of a European Member State. On occasion, when applying the national rules on jurisdiction for employers domiciled outside the European Union, an employee will not be able to sue the employer in a Member State, even though the employer operates a branch, agency or other establishment within that Member State, e.g. in the courts of Malta and Poland. In these cases the employees will surely benefit from the legal certainty provided by placing non-EU domiciliaries on equal footing with EU based employers.

In addition to the *forum rei,* Article 21 Brussels I Recast grants jurisdiction to the courts of the place in which, or from which, the employee habitually carries out his work, i.e. the *forum loci laboris.* If the proper forum cannot be determined on this basis, i.e., when the employee does not habitually carry out his work in or from one (Member) state, the court of the place of business through which the employee was engaged is awarded jurisdiction.[572] Hence, it must first be examined whether the employee principally carries out his work in or from one or several countries.[573] An employee works in one single country if the centre of his activities is located within the sovereign territories of that country.[574] In the absence of a centre of activities,[575] the place where the employee carries out the majority of his activities will suffice for determining the proper forum.[576]

Upon the entry into force of the Brussels I Recast the ambit of the Regulation was partially extended to non-EU defendants. In employment law matters, this means that employees may bring proceedings against an employer domiciled outside the European Union even if the employer does

[572] Article 21(1)(b)(ii) Brussels I Recast.
[573] *Cf.* Case C-29/10 *Heiko Koelzsch v État du Groot-Hertogdom Luxemburg* [2011] ECR I-1595, ECLI:EU:C:2011:151.
[574] Case C-383/95 *Rutten v Cross Medical [*1997] ECR I-57, ECLI:EU:C:1997:7, para. 23.
[575] Case C-383/95 *Rutten v Cross Medical* [1997] ECR I-57, ECLI:EU:C:1997:7, para. 23.
[576] Case C- 37/00 *Herbert Weber v Universal Ogden Services Ltd* [2002] ECR I-2013, ECLI:EU:C:2002:122, paragraph 42;*Cf.* Case C-29/10 *Heiko Koelzsch v État du Groot-Hertogdom Luxemburg* [2011] ECR I-1595, ECLI:EU:C:2011:151, para. 45.

not operate a secondary establishment within a Member State (or the dispute does not relate to the operation of such an establishment). In this, non-EU domiciliaries are placed on equal footing with EU based employers in the sense that an employee will be able to initiate legal proceedings against a third state employer in situations where the employee habitually carries out his work in a Member State or is engaged through a business that is situated in a Member State.

Surely, the place where the employee habitually carries out his work in performance of the (employment) contract is easily determined in situations where the employee performs his obligations towards the employer in one single country. Where the employee discharges his obligations towards the employer in more than one country it is more difficult to establish a single *locus laboris.* In those cases, one must rely on the definition provided in the case law of the European Court of Justice. According to the ECJ, in situations where the work is performed in more than one Member State, it is important to provide an independent meaning to the concept of 'habitual place of performance' in order to avoid a 'multiplication of courts having jurisdiction' and 'preclude a risk of irreconcilable decisions'.[577] As such, jurisdiction is not to be conferred on the courts of each Member State in which the employee performs or has performed his employment obligations.[578] Instead, the courts of the ´place where or from which the employee principally discharges his obligations towards his employer´[579] are to take cognizance of the dispute in its entirety. These are the courts of 'the place where the employee has established the effective centre of his working activities and where, or from which, he performs the essential part of his duties vis-à-vis his employer'.[580] In situations where the employee is set to perform the same or similar activities in multiple Member States it may be

[577] Case C-125/92 *Mulox IBC Ltd v Hendrick Geels* [1993] ECR I-4075, ECLI:EU:C:1993:306, para. 21; Case C-383/95 *Rutten v Cross Medical* [1997] ECR I-57, ECLI:EU:C:1997:7, para. 13. These decisions were held under the Brussels Convention, but equally applies under the Brussels I Regulation and the Brussels I Recast. *Cf.* Case C-220/88 *Dumez France and Tracoba* [1990] ECR I-49, ECLI:EU:C:1990:8, para. 18.

[578] Case C-125/92 *Mulox IBC Ltd v Hendrick Geels* [1993] ECR I-4075, ECLI:EU:C:1993:30, para. 23.

[579] Case C-125/92 *Mulox IBC Ltd v Hendrick Geels* [1993] ECR I-4075, ECLI:EU:C:1993:30, para. 24, 26.

[580] Case C-383/95 *Rutten* v Cross Medical[1997] ECR I-57, ECLI:EU:C:1997:7, para. 23, 26.

impossible to identify a centre of working activities. In those cases, the time spent working in the various Member States shall be decisive in determining jurisdiction.[581] Thus, the courts of the state in which the employee has worked for the longest time period shall have jurisdiction, except where there is a court that has a more significant connection to (the subject matter of) the dispute.[582] The criterion of 'the place in which, or from which, the employee habitually carries out his work' is thus given a broad interpretation, leaving little to no room for the application of the fallback rule of Article 21(1)(b)(ii) which awards jurisdiction to the engaging place of business. In fact, since the engaging place of business acts as secondary place of jurisdiction, its application is automatically excluded once a habitual place of work is established.[583] As such, the broad interpretation given to the concept of habitual employment leaves few situations in which the fallback rule of Article 21(1)(b)(ii) which awards jurisdiction to the engaging place of business would be applicable. The question may be raised as to whether the rule awarding jurisdiction to engaging place of business still serves a purpose or even serves to the benefit of the individual employee. Consequently, there have been calls to abolish the fallback rule of Article 21(1)(b)(ii) in favour of the general rules on jurisdiction which may provide the employees with more and alternative bases of jurisdiction whenever their place of habitual employment cannot be determined.[584]

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[581] Case C- 37/00 *Herbert Weber v Universal Ogden Services Ltd* [2002] ECR I-2013, ECLI:EU:C:2002:122, para. 50.

[582] Case C- 37/00 *Herbert Weber v Universal Ogden Services Ltd* [2002] ECR I-2013, ECLI:EU:C:2002:122, para. 50-54.

[583] *Cf.* Case C-384/10 *Jan Voogsgeerd v Navimer SA* [2001] ECR I-13275, ECLI:EU:C:2011:842, paras. 32, 38, 40. In *Voogsgeerd* the ECJ held that the court seised must take account of all the factors which characterise the activity of the employee and must, in particular, determine in which State is situated the place from which the employee carries out his tasks, receives instructions concerning his tasks and organises his work and the place where his tools are situated as well as 'the place of actual employment' and the place where the employee 'must report before discharging his tasks'. As such, the ECJ in Voogsgeerd appears to equate the place of habitual employment, for employees working in the transport sector, to 'a fixed base from which work is organised and where the personnel perform other obligations in relation to the employer'. See: COM(2005) 650 final, p. 7.

[584] See e.g. Grusic 2013, p. 173-192, who e.g. equates the position of employees, in the absence of a fallback rule in Article 21 Brussels I Recast to the position of claimant service providers, allowing for the claimant to initiate legal proceedings in the courts for each place where services are or have been provided. In my view, however, the application of the

*5.5.1.1 Recent developments*

The recent Recast of the Brussels I Regulation only effectuated minor alterations to the rules on jurisdiction in employment matters by providing a partial extension of Article 21(1)(b) Brussels I Recast to employers domiciled outside the European Union. Believing additional changes to the rules on jurisdiction existing in the area of employment law to be required, the Committee on Legal Affairs issued 'an own-initiative report on the question of jurisdiction in the field of employment law, with a view to the next amendment of the Brussels I Regulation.'[585] This includes a motion for a European Parliament resolution calling on the Commission to examine the rules of Article 7(2) Brussels I Recast in light of industrial action and to investigate whether the fallback clause of Article 21(1)(b)(ii) should be rephrased 'so as to refer to the place of business from which the employee receives or received day-to-day instructions rather than to the engaging place of business.'[586] Reasons provided for the a revision of Article 21(1)(b)(ii) Brussels I Recast are the scarcity of situations in which the criterion of the engaging place of business is relevant and the absence of a sufficient connection between the location of the engaging business and the employment dispute causing the forum not to benefit the employee.[587] By contrast, the Committee on Employment and Social Affairs makes a plea for a revision of Article 21 to include a *forum actoris.*[588] Accordingly, an employee should be able to sue his employer in the courts of the Member State in which the employee is domiciled. The inclusion of the latter

provisions relating to the provision of services in matters relating to an individual employment contract seems questionable at best. As is clear from Article 20(1) Brussels I Recast section 5 replaces the rules on general jurisdiction in matters relating to the individual employment contract. In the absence of a fallback provision providing for jurisdiction at the place of the engaging establishment, employees will thus only be able to resort to the *forum rei* (per Article 21(1)(a)) or, in cases where the disputes relates to the operations of a branch, agency or other establishment, to the courts of the place in which the latter is situated (per Article 20(1) and Article 7(5).

[585] Report on improving private international law: jurisdiction rules applicable to employment (2013/2023(INI)), p. 6.

[586] Report on improving private international law: jurisdiction rules applicable to employment (2013/2023(INI)), p. 5.

[587] Report on improving private international law: jurisdiction rules applicable to employment (2013/2023(INI)), p. 8.

[588] Report on improving private international law: jurisdiction rules applicable to employment (2013/2023(INI)), p. 11.

provision would coincide with the rules on jurisdiction already existing for the other two protected classes: consumers and insurees. In most cases however such a *forum actoris* will equate to the courts in the country of habitual employment, leaving few differences with the jurisdictional basis already existing in Article 21(1)(b)(i).

*5.5.1.2 Classification of transfer related claims*

As outlined above in paragraph 4, several claims may arise from a (cross-border) transfer of undertaking. As the employee-employer paradigm is paramount to the transfer of the rights and obligations stemming from the employment contract or relationship it appears natural to apply, in the absence of specific rules on jurisdiction relating to a transfer of undertaking, the rules existing for individual contracts of employment when it comes to attributing jurisdiction in a transfer related dispute.[589] Surely, in the absence of an employment contract or employment relationship existing between the transferor and the employee on the date of the transfer no transfer of undertaking (in the sense that is attributed to this legal concept in the area of employment protection) would transpire by reason of the acquisition of the transferor's undertaking or part of the transferor's undertaking by the transferee. Yet, the variety of claims possibly resulting from a transfer of undertaking, although they are almost uniformly founded in the individual contract of employment, range from being collective to individual in nature. In this sense, it is important to establish which claims rooted in or connected to the individual contract of employment or employment relationship are covered by the special rules on jurisdiction for individual employment contracts existing in section 5 of the Brussels I Recast.

*5.5.1.2.1 Concept 'individual contract of employment'*

The section on jurisdiction over individual contracts of employment does not provide a definition of the term 'individual contract of employment' or the notion of 'employee'.[590] It is in line with the general purpose and objectives of the Brussels I Recast that these concepts are interpreted in an autonomous fashion. An autonomous or independent definition will thus ensure an equal and uniform application of the regulation throughout the Member States. In

[589] For the preferred jurisdictional path, see paragraph 6 of the current Chapter.
[590] See section 5 Brussels I Recast; Magnus & Mankowski 2007, p. 328.

the case law pertaining to the Brussels Convention the ECJ has provided certain indicators that serve to a better understanding of the notion of 'employment contract':

> "…contracts of employment, like other contracts for work other than on a self-employed basis, differ from other contracts – even those for the provision of services – by virtue of certain particularities: they create a lasting bond which brings the worker to some extent within the organizational framework of the business of the undertaking or employer (…)."[591]

As such, under an individual employment contract the employee is included in the organizational framework of the employer, suggesting a certain degree of subordination.[592] The existence of an individual employment contract requires a contract to be concluded between an employee and an employer. Within this authoritative relationship it is the employer who exercises control over the employee by providing mandatory instructions. The employee, in turn, is entitled to remuneration and is exempt from the risks associated with doing business.[593] Although the above provides a definition of the concept 'individual employment contract' the different language versions of the Brussels I Recast suggest that the concept is to include individual obligations arising out of an employment contract.[594]

Whereas, the definition of employment contract appears autonomous to the Brussels I Recast, a different situation exists under the Acquired Rights Directive. A transfer of undertaking is predicated on the existence of an employment contract or employment relationship between the transferor and the employee(s). In the absence of such an employment relationship a transfer of undertaking would not take effect. Moreover, the personal scope of the directive is in part defined by the national laws of the Member States and their definition of the terms employment contract and employment

[591] Case 266/85, *Hassan Shenavai v Klaus Kreischer* [1987] ECR 00239, ECLI:EU:C:1987:11, para 16; Magnus & Mankowski 2007, p. 328.
[592] Mankowski 2009, p. 23; Kuypers 2008, p. 715.
[593] Mankowski 2009, p. 23; Kuypers 2008, p. 715.
[594] *Cf.* The Dutch language version: 'bevoegdheid voor individuele verbintenissen uit arbeidsovereenkomst' or the German language version: ''ein individueller Arbeitsvertrag oder Ansprüche aus einem individuellen Arbeitsvertrag'.

relationships[595], allowing a considerable amount of divergence in the application of the directive and its national counterparts throughout the Member States.[596] Still, it stems from the directive that only those employees integrated in the economic entity to be transferred may rely on the provisions of the Acquired Rights Directive. As such, the directive, similar to the Brussels regime, suggests that the definition of employment contract or employment relationship is predicated on the employees' position in the organizational framework of the business of the employer.

*5.5.1.2.2 Concept of employee*

Under the Brussels regime, the definition of employee, similar to that of 'individual employment contract', for reasons of legal certainty and a uniformity of decisions, is likely to require an autonomous interpretation. In providing this definition the meaning given to the concept in other parts of EU law could potentially be drawn upon.[597] However, the majority of EU legislation in the employment area leaves the definition of employee to the national laws of the Member States. As such, an autonomous definition of the concept of employee, even one that draws upon the existing definitions of employee in European Union law, might be at odds with the definition of employee under the Acquired Rights Directive, which leaves it to the Member States to determine which parties can invoke the acquired rights provisions as an employee. As per Article 2(1)(d) of the Acquired Rights Directive '"employee" shall mean any person who, in the Member State concerned, is protected as an employee under national employment law.' Moreover, as outlined above, the scope of the directive is in part defined the by the national laws of the Member States and their definition of employment contract and employment relationships.[598] Once it has been established that an employee enjoys protection as an employee under national law he may rely on the acquired rights provisions if, at the time of the transfer, he is employed by the transferee in addition to being part of the

[595] Article 2(2) Acquired Rights Directive, which provides: 'This Directive shall be without prejudice to national law as regards the definition of contract of employment or employment relationship'. See Chapter 2, paragraph 4.

[596] Hepple 1998, p. 5; CMS report 2006, p. 20.

[597] For example, the meaning given to 'employee' under the Rome I Regulation.

[598] Article 2(2) Acquired Rights Directive, which provides: 'This Directive shall be without prejudice to national law as regards the definition of contract of employment or employment relationship'.

organizational framework of the undertaking to be transferred. Given the similarities of this definition to the notion of employment contract under the Brussels regime (see paragraph 5.5.1.2.1), it seems unlikely that a uniform definition of the concept of employee under the Brussels I Recast would prevent those entitled to the safeguarding of their employment relationship under the Acquired Rights Directive from access to the jurisdictional bases available in matters relating to the individual contract of employment under Article 21 Brussels I Recast. However, it should be remembered that the personal scope of the Acquired Rights Directive and its national counterparts, being a test of substantive law, is to be applied second to the definitions in private international law, in the areas of jurisdiction and the conflict of laws. Therefore technically no conflict of definitions will arise.

*5.5.1.2.3 Person of the plaintiff*

Surely, whether a person is classified as an employee under section 5 of the Brussels I Recast is to be assessed on an individual basis. The facts of the case and the specific characteristics of the employment relationship will determine whether there exists an individual contract of employment within the meaning of section 5 of the Brussels I Recast. In this sense, it is noteworthy that a textual or grammatical interpretation of Article 21 Brussels I Recast suggests that for claims relating to the individual contract of employment the person of the plaintiff, in cases where an action is brought against an employer, is irrelevant. This absence of a specific mention of the employee, as the person of the plaintiff, is in stark contrast to the other two sections providing special rules of jurisdiction for weaker economic and contractual parties, i.e. the sections on jurisdiction in matters relating to insurance and consumer contracts, which do make reference to the person of the plaintiff.[599] A parallel interpretation of the sections on insurance and consumer contracts suggests that professional parties cannot rely on the special provisions providing jurisdiction for weaker parties, as by their very definition these parties do not possess the weaker contractual or socio-economic position which requires the rules on jurisdiction to be

[599] E.g. Article 17(1) Brussels I Recast provides: 'A *consumer* may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or, regardless of the domicile of the other party, in the courts for the place where the consumer is domiciled.'

tailored in their favour. As such, it is unclear whether trade unions and other (professionalized) employee representatives will be able to make use of the special rules on jurisdiction provided in section 5. In addition, it will depend on the nature of the instituted claim whether a claim by a trade union acting on behalf of an employee will even be classified as an action relating to the individual employment contract.

*5.5.1.2.4 Claims relating to a cross-border transfer of undertaking*

For most claims relating to or arising from a cross-border transfer of undertaking their connection to the individual employment contract will be easily established. These claims, such as claims relating to unfair dismissal, claims for (re)employment and salary claims undoubtedly belong to the purview of the rules on jurisdiction over individual contracts of employment. Other possible claims arising from or connected to the transfer of undertaking also have a strong connection to the employment contract. Indeed, in the absence of an individual employment contract or employment relationship no transfer of undertaking would take place. However, since section 5 is limited to obligations arising from an *individual* contract of employment claims that are collective in nature are beyond the scope of this section. This surely holds true for claims relating to obligations arising from a collective agreement. In situations where an employee or employee representative seeks the observance of terms and conditions agreed in collective agreements section 5 of the Brussels I Recast cannot be relied upon. As such, claims relating to collective agreements befall the general rules on jurisdiction. Even though, in situations where an individual employee wants to hold the transferee to obligations stemming from a collective agreement, the basis of his claim is related to his position as an employee, the claim cannot be classified as arising from the individual contract of employment. Whereas it is instantly clear that claims relating to collective agreements do not equate to the individual contract of employment it is somewhat more difficult to classify claims regarding the preservation of status and function of employee representatives and claims relating to the observance of information and consultation requirements. Claims relating to the status and function of employee representatives, although where it concerns the individual representative related to the individual contract of employment, fall outwith the provisions on special jurisdiction over the individual contracts of employment. The reason for this

is that employee representatives who seek restoration of their status and function by the transferee or, as individual representatives, seek continuance of the protection provided to employee representatives by the laws, regulations, administrative provisions or practice of the Member States, do so on the basis of their position as employee representatives rather than on the basis of their position as an individual employee. As such, employee representatives and trade unions seeking a preservation of their status and function as employee representatives must rely on the general rules on jurisdiction providing jurisdiction to the *forum rei* and alternatively the courts of the place where the transferred undertaking is situated.[600]

In respect of claims relating to the information and consultation of employee representatives Article 7 of the Acquired Rights Directive requires the transferor and transferee to inform and consult[601] the representatives of their *respective* employees of several transfer related issues. As such, the information and consultation of employee representatives does not appear a cross-border issue *per se*.[602] Yet, the Member States have not equally transposed the information and consultation provision into their national legislation. There are some Member States, such as Germany and Austria, which impose a common duty on the transferor and transferee to inform and consult the employees or employee representatives.[603] In these countries the transferor *or* transferee is required to inform the employees/ employee representatives of the (effects of the) upcoming transfer, allowing a foreign transferee to inform and consult the employees/ employee representatives of the undertaking to be transferred. Consequently, the affected employees may initiate legal proceedings for a failure to comply with information and consultation requirements against a foreign transferee, resulting in a cross-

[600] As regards a dispute arising out of the operations of a branch, agency or other establishment the courts of the Member State in which the branch, agency or other establishment is situated shall have alternative jurisdiction on the basis of Article 7(5) Brussels I Recast.

[601] Article 7(1) for information requirements; Article 7(2) for consultation requirements.

[602] *Cf.* CMS report 2006, p. 59.

[603] §613a(5)BGB; §3a AVRAG; According to the German Explanatory Memorandum it is up to the transferor and transferee to decide how they will fulfill this common duty: '*Zur Unterrichtung der Arbeitnehmer sind der bisherige Arbeitgeber oder der neue Inhaber verpflichtet. Beide sollen sich untereinander verständigen, in welcher Weise sie ihre Informationspflicht erfüllen.'* (BT-Drucks 14/7760, p. 19.

border dispute. As such, the idea that a failure to properly inform and consult employee representatives cannot not in itself amount to a transnational dispute proves false. For example, the acquisition of a business previously operated by a Dutch NV by a German AG will amount to a cross-border transfer of undertaking. If the Dutch employees of the transferred undertaking decide to initiate legal proceedings against the German transferee for a failure to inform and consult the employees and/or employee representatives before a Dutch court there exists a cross-border dispute. This dispute is transnational in nature irrespective of the applicable law, i.e. of whether the transferee is actually obliged to inform and consult the employees/ employee representatives of the undertaking to be transferred.[604]

The difficulty in classifying information and consultation requirements lies in the fact that it is not always clear whether the individual employees or their representatives have a right to such information and consultation. The wording of the general rule of Article 7 of the Acquired Rights Directive clearly provides that this right befalls the representatives of the employees. Only in the absence of employee representatives must the affected employees be informed individually.[605] In addition, some Member States, such as Germany, have transposed the provisions of regarding information and consultation requirements only to the benefit of the individual employee. For example, on the basis of § 613a(5) BGB transferor and transferee are required to inform the individual employees of several transfer related issues. Logically, actions relating to information and consultation requirements will only be covered by section 5 Brussels I Recast if the rights to such information and consultation are considered to stem from the individual contract of employment under the autonomous definition provided thereof in the Brussels I Recast. If the transferee and transferor are required to inform and consult the employee representatives, claims initiated by employee representatives for a failure to comply with these requirements are therefore likely to be beyond the scope of section 5. By contrast, where an individual employee initiates proceedings for a failure to comply with information requirements on the basis of his individual right to such

[604] Such a duty does exist in German law § 613a(5)BGB, whereas it does not in Dutch law Art. 25(1)(a)(b) WOR and Art. 7:665a BW.
[605] Article 7(6) Acquired Rights Directive.

information his claim is likely to be covered by the rules on jurisdiction for individual contracts of employment.

Surely, the attribution of jurisdiction in disputes relating to a failure to properly of inform and consult employees and their representatives upon a transfer of undertaking would benefit from an abstract classification, without recourse to national law. However, it is the nature of the instituted claim that is decisive for the determination of jurisdiction under the Brussels I Recast. As the above shows the nature of this claim, as an inevitable result of minimum harmonization, may vary from collective to individual depending on the applicable law.

*5.5.2 Claims initiated by the transferor or transferee*

There may be some, limited, situations in which the transferee or transferor will seek to initiate legal proceedings against an employee for reasons, partly, relating to of a cross-border transfer of undertaking. Since the Acquired Rights Directive effectuates an automatic transfer of the existing employment contracts and employment relationships from the transferor to the transferee, the transferee, as the new employer, may wish to sue an individual employee for a failure to comply with obligations arising from the employment contract. If the employee contests the position of the transferee as the employer, the transferee may invoke Article 3(1) of the Acquired Rights Directive or its national counterpart(s).

On the basis of Article 22 Brussels I Recast the employer, either the transferee or the transferor, may only bring proceedings in the courts of the Member State in which the employee is domiciled. As such, Article 22 essentially forms a reproduction of the general rule attributing jurisdiction to the *forum rei* under Article 4 of the Brussels I Recast. In most cases, the domicile of the employee will coincide with the place where the employee habitually carries out his work. In addition to being able to sue the employee in the courts of the latter's domicile, the employer, by reason of Article 22(2) has the right to bring a counter-claim in the court in which the original claim is pending. Thus, in situations where the employee acts as a plaintiff the employer, being either the transferor or the transferee, is entitled to present a counter-claim at the same venue.

*5.5.3 Jurisdiction clauses*

In general, as derived from the principle of party autonomy, the parties are free to choose the court(s) internationally competent to govern any disputes arising from their legal relationship.[606] The transferor, as the initial employer, and the employee, may, for example, upon the conclusion of the employment contract agree to a choice of forum, subjecting any disputes which have arisen or which may arise in connection with their legal relationship to a designated court. In matters where the choice of forum or jurisdiction clause is considered part of the contract of employment or the employment relationship such a clause will bind the transferee by reason of the transfer of undertaking.[607] Thus, the fact that the transferee did not consent to the jurisdiction clause as he did not partake in drafting the agreement cannot be invoked against the employee.

As a general rule, a valid jurisdiction clause confers exclusive jurisdiction on the designated court.[608] Yet, in matters relating to the individual contract of employment the parties possess limited autonomy to designate the court(s) having jurisdiction.[609] Within the employee-employer paradigm the employee is most often considered a weaker party in need of protection.[610] In order to compensate for the existing inequality in bargaining power between the employee and employer, Article 23 of the Brussels I Recast only allows for specific jurisdiction clauses to the benefit of the employee.[611] According to Article 23, the provisions on jurisdiction over individual contracts of employment, as contained in section 5 of the Brussels I Recast, may only be departed from by agreements entered into after the dispute has arisen[612] or agreements which allow the employee to bring proceedings in the courts other than those indicated by Articles 20 and 21 Brussels I Recast.[613] As

[606] Recital 19 Brussels I Recast.
[607] Article 3(1) Acquired Rights Directive (Directive 2001/23/EC).
[608] Article 25(1) Brussels I Recast.
[609] Recital 19 Brussels I Recast.
[610] E.g. Recital 18 Brussels I Recast outlines that as the weaker party, the employee 'should be protected by rules of jurisdiction more favourable to his interests than the general rules'; C-462/06 *Glaxosmithkline and Laboratoires Glaxosmithkline v Jean-Pierre Rouard* [2008] ECR I-3965, ECLI:EU:C:2008:299, para.17.
[611] *Cf.* Magnus, Mankowski *et al.* 2012, p. 343.
[612] Article 23(1) Brussels I Recast.
[613] Article 23(2) Brussels I Recast.

such, Article 23 Brussels I Recast subjects the parties' freedom to choose the court that will preside over their dispute to two distinct conditions. The parties may, after a dispute has arisen, agree to have their dispute adjudicated by a specific court. By agreeing to do so after the dispute has arisen, the parties oust the jurisdiction of the courts what would otherwise be competent on the basis of Article 20 and 21 Brussels I Recast. In other words, jurisdiction agreements concluded after the manifestation of a dispute are exclusive in nature. Given the employee protective nature of section 5, exclusivity of the choice of forum is possible due to the fact that, at this stage in the employment relationship, the inequality between employee and employer has, to a large extend, been lifted.[614] This is not the case in situations where the jurisdiction clause or choice of forum has been made prior to the existence of a dispute. In situations where e.g. a jurisdiction clause has been inserted *ab initio* in the employment contract such a choice of forum is invalid[615] save for the situations in which the choice of forum allows the employee to bring proceedings in a court other than those indicated in Articles 20 and 21 Brussels I Recast. As such, a jurisdiction clause entered into before a dispute has arisen is only permissible under the regulation if it provides the employee with a forum additional to the courts ordinarily having jurisdiction on the basis of section 5.[616] As such, employer and employee are free to conclude a jurisdiction clause granting additional jurisdiction to a court other than the court of the employer's domicile, the court of the place of habitual employment or the court of the location of the business engaging the employee.[617] In doing so, the parties may even grant jurisdiction to the courts of a non-Member State insofar as the clause or agreement conferring such jurisdiction does not exclude jurisdiction provided by the regulation.[618]

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[614] See Magnus, Mankowski *et al.* 2012, p. 344.

[615] Provisions contrary to Article 23 are without legal force per Article 25(4).

[616] Opinion Advocate General Mengozzi *Ahmed Mahamdia v People's Democratic Republic of Algeria* Case C-154/11 [2012] ECLI:EU:C:2012:309, para. 54-60; C-154/11 *Ahmed Mahamdia v People's Democratic Republic of Algeria* [2012] ECLI:EU:C:2012:491, para. 62, 63; Jenard report 1979, p. 33.

[617] See Article 21 Brussels I Recast.

[618] C-154/11 *Ahmed Mahamdia v People's Democratic Republic of Algeria* [2012] ECLI:EU:C:2012:491, para. 65*;* Since Article 23 itself makes no mention of the courts allowed to be designated; it is generally assumed that the parties may also grant jurisdiction to the courts of a non-Member State. This not only applies to the additional forum of Article

*5.5.4 Tacit prorogation of jurisdiction*

As per Article 26 of the Brussels I Recast tacit prorogation of jurisdiction occurs when the defendant enters an appearance before a Member State court that does not have jurisdiction on the basis of other provisions of the regulation. By appearing and lodging his defences on the merits without contesting jurisdiction the defendant tacitly submits to the jurisdiction of the court. However, in matters where the employee is the defendant, the newly inserted paragraph 2 of Article 26 guarantees that the employee is informed of his right to contest the jurisdiction of the court and the consequences of entering or not entering an appearance. The inclusion of this paragraph excludes situations in which, an employee without knowing so submits to the courts of a state that would not otherwise have jurisdiction on the basis of the regulation.

*5.5.5 Arbitration clauses*

Where an arbitration agreement is part of a contract of employment or where it has been concluded within the employee-employer paradigm,[619] such arbitration agreement will, upon a transfer of undertaking, transfer to the transferee by operation of law. As such, the fact that the transferee was not party to drafting the agreement cannot be invoked against the employee. The transferor and employee may, for instance, as is not uncommon in employment matters, agree that any and all disputes arising from the contract of employment or employment relationship will be submitted to (binding) arbitration.[620] Consequently, the transferor, transferee and employee will all

23(2), but also to jurisdiction clauses concluded after a dispute has arisen per Article 23(1), see: Gottwald, *Münchener Kommentar zur ZPO*, 2013, Art. 21, para. 2.

[619] There is some discussion/ ambiguity as to whether an arbitration agreement in a collective agreement (where the collective agreement has not been incorporated in to the employment contract) will transfer to the transferee. Where the employee seeks to initiate proceedings against the transferor, an arbitration clause in a collective agreement will surely apply. Generally, the non-compliance with an arbitration clause in a collective agreement will lead to inadmissibility before the (national) courts: HR 17 January 2003, *NJ* 2004/280, ECLI:NL:HR:2003:AF0136; HR 14 December 1973, *NJ* 1974/92; HR 22 December 1985, *NJ* 1986/275.

[620] Arbitration clauses in employment contracts or collective agreements are not uncommon. It is not always necessary that the parties have explicitly agreed on arbitration, a mere reference to a collective agreement containing an arbitration clause in an individual contract

be bound by the arbitration agreement. By agreeing to arbitration the parties oust the court(s) that would otherwise be competent, e.g. on the basis of the Brussels I Recast.

The Brussels I Recast, in Article 1(2)(d), explicitly excludes arbitration from its substantive scope of application. In addition, Article 73(2) states that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958, takes precedence over the Regulation. Yet, the parties may challenge the validity of the arbitration agreement as a preliminary issue by initiating legal proceedings before a (non-chosen) Member State court. Such a court must, in order to determine its jurisdiction over the substance of the dispute, also evaluate the validity and effect of the arbitration agreement.[621] The fact that parties may consciously seek (Member State) court intervention in order to elude arbitral proceedings, with a risk of resulting parallel proceedings and irreconcilable judgments, was one of the main issues discussed during the Recast of the Brussels I Regulation.[622] As such, in an effort to improve the interface between the Brussels I Regulation and arbitration the initial proposal for the Brussels I Recast[623] included in Art. 29(4) a *lis pendens* provision on the jurisdiction of Member State courts whose jurisdiction is challenged on the basis of an arbitration agreement. According to the proposed provision 'where the agreed or designated seat of an arbitration is in a Member State, the courts of another Member State whose jurisdiction is contested on the basis of an arbitration agreement shall stay proceedings once the courts of the Member State where the seat of the arbitration or the arbitral tribunal is

of employment is sufficient to subject any disputes to arbitration. (HR 17 January 2003, *NJ* 2004/280, ECLI:NL:HR:2003:AF0136); Van Slooten 2011, p. 79.

[621] Commission Staff Working Paper, Impact assessment accompanying to the document of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast), COM [2010] 748 final, SEC [2010] 1548 final, p. 35-37.

[622] Commission Staff Working Paper, Impact assessment accompanying to the document of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast), COM [2010] 748 final, SEC [2010] 1548 final, p. 35-37; Lazic 2011, p. 290-291.

[623] Proposal for a Regulation of the European Parliament and for the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast), *SEC* [2010] 1547 final; *SEC* [2010] 1548 final.; COM[2010]748 final.

have been seised of proceedings to determine, as their main object or as an incidental question, the existence, validity or effects of that arbitration agreement.'[624] Consequently, the courts of a Member State whose jurisdiction is challenged on the basis of an arbitration agreement shall stay proceedings or decline jurisdiction, if prescribed by national law,[625] in favour of the courts or tribunal of the Member State of the seat of arbitration. Once the existence, validity or effect(s) of the arbitration agreement is established Article 29(4) requires the court seised to decline jurisdiction.[626] Although the provision of Article 29(4) may have indicated the relation between arbitration and the Brussels I Recast, it did not offer a solution when it comes to employment matters as those were expressly excluded from the provision.[627]

The Recast has not, ultimately, resulted in explicit changes to the regulation, the proposed Article 29(4) has been scrapped and recital 12 now delineates the scope of the Regulation with respect to arbitration:[628]

> "This Regulation should not apply to arbitration. Nothing in this Regulation should prevent the courts of a Member State, when seised of an action in a matter in respect of which the parties have entered into an arbitration agreement, from referring the parties to arbitration, from staying or dismissing the proceedings, or from examining whether the arbitration agreement is null and void, inoperative or incapable of being performed, in accordance with their national law."[629]

Accordingly, the Member States are free to, among others, in proceedings where jurisdiction of the court is challenged on the basis of an existing arbitration agreement or where the validity of the arbitration agreement is otherwise raised as a preliminary issue, refer the matter to arbitration, to stay or dismiss proceedings or to assess the validity and effect of the arbitration agreement. Yet, when it comes to the recognition and enforcement of judgments in which the validity or effect of the arbitration agreement has

[624] Art. 29(4) paragraph 1 proposal Brussels I Recast.
[625] Article 29(4) paragraph 2.
[626] Article 29(4) paragraph 3.
[627] Article 29(4) paragraph 4 expressly excludes insurance, consumer and employment law matters.
[628] See Ippolito & Adler-Nissen 2013, p. 165-166.
[629] Recital 12, paragraph 1.

successfully been challenged, either as a preliminary or a substantive issue, the rules on recognition and enforcement contained in the regulation should not be applied. Surely, in situations where the validity or effect of an arbitration agreement is a principal issue, the Brussels I Recast will not be applicable. Yet, in cases which are substantially covered by the Brussels I Recast where the validity of an arbitration agreement is raised as an incidental issue, the (jurisdictional) rules of the regulation, including those on recognition and enforcement of foreign judgments, require application. Moreover, in situations where a Member State court has determined that an arbitration agreement is 'null and void, inoperative or incapable of being performed', its judgment on the substance of the matter still requires recognition and enforcement on the basis of the regulation.[630] Here, the fact that a Member State court has, incidentally, decided on a matter which is not covered *ratione materiae* by the Brussels I Recast, does not prevent the regulation from being applied.[631] There may even be a partial recognition and enforcement of the judgment, excluding the decision on the matter, e.g. the decision on the validity or existence of the arbitration agreement, which falls outside the scope of the Brussels I Recast. Thus an employee, who has received a positive judgment of a Member State court, after a successful challenge of an arbitration clause, on a matter relating to a transfer of undertaking can apply for recognition and enforcement of the substantive part of the judgment in accordance with the Brussels I Recast. In situations where there exist conflicting judgments of a Member State court and an arbitral tribunal, recognition and enforcement of the arbitral award on the basis of the New York Convention takes precedence. Thus, the present delineation between the Brussels I Recast and arbitration, although improved compared to the Brussels I Regulation, still leaves room for abusive litigation tactics and parallel proceedings.

*5.6 Multiple defendants*

An employee or his representative may wish to sue both the transferor and transferee in composite proceedings. In disputes relating to a cross-border transfer of undertaking an employee is likely to have connected claims against multiple defendants, i.e. the transferor and transferee, domiciled in

[630] Recital 12, paragraph 3.

[631] *Cf.* Magnus, Mankowski *et al.* 2012, p. 632.

different Member States. An employee may, for instance, wish to sue transferee and transferor for damages and/or employment for unfair dismissal upon a transfer of undertaking.[632] Other claims could e.g. include a failure to comply with information and consultation requirements, failures to uphold rights and obligations stemming from (collective) employment contracts and disputes concerning the existence of a transfer of undertaking.[633] The likelihood of joint or connected claims is furthered by the fact that the Acquired Rights Directive offers the Member States the possibility of imposing joint and several liability on transferor and transferee for a failure to comply with pre-transfer obligations stemming from the employment contract or employment relationship.[634] As such, several Member States, such as Belgium, Germany, France, Italy, Luxembourg and the Netherlands allow for the joint and separate liability of transferor and transferee upon the transfer of undertaking.

In situations where the employee, employee representatives or trade unions wish to sue both the transferee and the transferor, Article 8(1) Brussels I Recast allows both claims to be brought before a single court.[635] Article 8(1) Brussels I Recast, which provides the option of composite proceedings at the court of domicile of one (former) employer, states:

> "A person domiciled in a Member State may also be sued where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that

[632] *Cf.* BAG 26 May 2011 – 8 AZR 37/10, NZA 2011,1143; LAG Baden-Württemberg 15 December 2009 - 22 Sa 45/09; ArbG Freiburg 13 March 2009 - 14 Ca 515/08.
[633] *Cf.* BAG 26 May 2011 – 8 AZR 37/10, NZA 2011,1143; LAG Baden-Württemberg 15 December 2009 - 22 Sa 45/09; ArbG Freiburg 13 March 2009 - 14 Ca 515/08
[634] Article 3(1) paragraph 2 ARD (2001/23/EC).
[635] This was not possible under the predecessor of the Brussels I Recast, the Brussels I Regulation, under which the provision on multiple defendants (Article 6) was not considered to apply to the section of individual employment contracts: See Case C-462/06 *Glaxosmithkline, Laboratoires Glaxosmithkline v Jean-Pierre Rouard* [2008] ECLI:EU:C:2008:299.

> it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings."[636]

Thus, application of the special jurisdictional provision on multiple defendants is dependent on a number of requirements. First, both the anchor defendant and the co-defendant(s) have to be domiciled in a Member State. The Article does not apply to third country co-defendants, i.e. those not domiciled in a Member State, even in situations where they are part of a number of defendants, some of whom are domiciled in a European Member State.[637] Article 6 of the Brussels I Recast exhaustively governs the issue of jurisdiction in relation to third state defendants. According to paragraph 1 of Article 6 jurisdiction over those not domiciled in a Member State is to be determined, subject to Article 18(1), Article 21(2) and Articles 24 and 25, by the law of the Member State of the court seised. As such, where it concerns (individual) employment (contract) matters, the newly inserted Article 21(2), which allows employees to bring suit against a third state employer in the courts of habitual employment or the courts of the engaging business, has no bearing on the application of Article 8. Thus, an employee wanting to sue both transferor and transferee in composite proceedings, can only do so under the Brussels I Recast where both transferor and transferee are EU domiciliaries.

*5.7 Concluding remarks*

The aim of the present paragraph was to outline the existing rules on jurisdiction throughout the Member States of the European Union insofar as it concerns claims arising from or relating to a cross-border transfer of undertaking. In determining international jurisdiction in disputes arising from a cross-border transfer of undertaking, in the absence of any provisions on international jurisdiction existing in the Acquired Rights Directive, the Brussels I Recast is the main instrument of importance. After all, throughout the European Member States the Brussels I Recast is the primary and

[636] The wording of Article 8(1) reflects the ruling in Case 198/87 *Athanasios Kalfelis v Bankhaus Schröder Münchmeyer Hengst and co. and others* [1988] ECR 5565, ECLI:EU:C:1989:283, para.13 and ruling.

[637] Case C-645/11 *Land Berlin v Sapir a.o.* [2013] ECLI:EU:C:2013:228; Opinion Advocate General Trstenjak *Land Berlin v Sapir a.o.* Case C-645/11 [2012] ECLI:EU:C:2012:757, para. 105-122

universally applied instrument for establishing international jurisdiction in civil and commercial matters. Although it must be recognized that a transfer of undertaking inhabits certain semi-public components complicating its classification as a civil and commercial matter, all claims arising from a transfer of undertaking are covered *ratione materiae* by the Brussels I Recast. After all, all actors involved in a transfer of undertaking, such as transferor, transferee, employee(s) and employee representative(s) are likely private individuals or private entities. In essence, it can be stated that all claims arising from or related to a (cross-border) transfer of undertaking befall the substantive scope of the regulation, as long as these claims do not pertain to the exercise of public authority. Several claims such as claims for unfair dismissal or for the preservation of status and function (insofar as this is possible in cross-border transfer scenarios) of employee representatives may therefore arise. As is apparent from the preceding (sub)paragraphs these claims do not befall a single jurisdictional category under the Brussels I Recast. Although a transfer of undertaking is inherently subject to the employee-employer paradigm the rights and obligations stemming from such a transfer are not limited to the individual employment relationship. In addition to individual interests the Acquired Rights Directive and its national counterparts inhabit certain operational, economic and collective employment interests which cannot be subsumed under the special rules on jurisdiction for disputes relating to individual employment contracts. In fact, subsuming all claims arising from a transfer of undertaking under any one of the existing jurisdictional bases or categories appears incompatible with the Brussels regime, which attributes jurisdiction on the basis of the instituted claim. As a result of such incompatibility the various claims that might arise from a transfer of undertaking are subject to different rules on jurisdiction; whereas some are subject to the general rule of Article 4, awarding jurisdiction to the domicile of the defendant, other claims befall the variety of jurisdictional bases offered by the special jurisdictional category for individual contracts of employment. Whether distributing the several claims arising from a transfer of undertaking over several jurisdictional rules, resulting in different jurisdictional bases (and competent courts) for different transfer-related claims is desirable or whether a separate jurisdictional category within the Brussels I Recast or the Acquired Rights Directive is warranted are questions that will be answered in the following, final, paragraph of the present Chapter.

## 6. Preferred jurisdictional path

As is apparent from the introduction, the present Chapter serves a dual purpose as it seeks to outline the rules on jurisdiction pertaining to cross-border transfers of undertakings throughout the EU Member States as well as to assess whether these rules on jurisdiction are in need of revision. In answering these questions the previous paragraphs have shown that issues of international jurisdiction in situations involving a transfer of undertaking are universally considered to befall the Brussels I Recast. In addition, the different views and theories on the classification of transfers of undertakings that exist within the area the conflict of laws are not upheld when it comes to establishing the competent court. More so, the issue of jurisdictional classification is one that appears far afield from the discussion on international jurisdiction in situations involving a cross-border transfer of undertaking. Whether the various views on the appropriate conflict of laws path for transfers of undertakings may have any bearing on the proper jurisdictional path is an issue that will be discussed in this final paragraph. Since the Acquired Rights Directive is absent of any provisions on international jurisdiction, the effectiveness of the Brussels I Recast in relation to cross-border transfers requires assessment. The Recast itself offers no specific jurisdictional category for transfers of undertakings, resulting in the claims arising therefrom to be accommodated within the existing provisions of the regulation. The question therefore arises whether these existing provisions offer a satisfactory solution in establishing the competent court for claims arising from a transfer of undertaking. As such, the present paragraph seeks to outline the preferred jurisdictional path for claims resulting from a cross-border transfer of undertaking. In doing so, it addresses the effectiveness of the existing regime and questions whether this regime should be upheld or requires revision or replenishment.

### *6.2 Effectiveness of existing legal instruments*

Since the Acquired Rights Directive itself is absent of any provisions on international jurisdiction, throughout the EU Member States, jurisdiction over claims arising from a cross-border transfer of undertaking is to be established on the basis of the Brussels I Recast. Although some difficulties may arise in classifying all claims stemming from a transfer of undertaking

as civil and commercial matters,[638] these claims may generally be considered to befall the substantive scope of the regulation, as long as they do not concern the exercise of public powers. The Acquired Rights Directive bestows several rights and obligations of a different nature on those affected by a transfer of undertaking. As a result, a wide range of claims initiated by different actors, such as employees, employee representatives, trade unions, transferor and transferee, may arise in relation to a cross-border transfer of undertaking. Since the Brussels I Recast does not include a special jurisdictional category for transfers of undertakings, all claims arising from or in relation to a cross-border transfer of undertaking are accommodated within the existing provisions of the regulation. In other words, the Brussels I Recast does not offer a single jurisdictional basis for all transfer-related claims, but instead, divides them among several Articles on jurisdiction on the basis of the initiated claim. The various claims that might arise from a transfer of undertaking are therefore subject to different rules on jurisdiction: whereas some plaintiffs will have to make due with the general rule of Article 4, awarding jurisdiction to the domicile of the defendant, others can seek refuge in the variety of jurisdictional bases offered by the special jurisdictional category for individual contracts of employment.

*6.2.1 Individual employment claims*

Most claims arising from a cross-border transfer of undertaking, such as claims for unfair dismissal,[639] objections to a transfer,[640] claims for redundancy payments due to the existence of a substantial change in working conditions[641] or claims for (re)employment due to the existence of a transfer,[642] will seek enforcement of individual employment rights. In these cases, section 5 of the Brussels I Recast, offers special rules on jurisdiction. Here, as outlined in the present Chapter, Article 21 determines that, in

[638] The problem with this classification lies in the semi-public nature of some parts of a transfer of undertaking, especially where it concerns the preservation of status and function of employee representatives, since in some Member States, e.g. Belgium, the application of such provisions is enforced by administrative fines.

[639] Article 4(1) Acquired Rights Directive.

[640] Article 3(1) Acquired Rights Directive

[641] Article 4(2) Acquired Rights Directive.

[642] Article 3(1) Acquired Rights Directive.

addition to the courts of his domicile,[643] an employer may commonly be sued in the courts of the place where, or from where, the employee habitually carries out his work. In the absence of a relocation of the undertaking to be transferred this place will generally be easily established and equate to the location of the pivot of the transfer, i.e. the undertaking to be transferred. As employees generally tend to carry out their work in a single country, the place of habitual employment is mostly easily established. In situations involving a transfer of undertaking without relocation the actual and legal position of the affected employees will, in principle, be subject to little change. They will continue to their employment within the same undertaking, at the same location, within the same country. Upon a transfer-related dispute, rooted in or connected to the individual contract of employment, an employee will thus be able to sue the employer (either transferor or transferee) in the courts of the Member State of latter's domicile or in the court of the place where he has thus far discharged his employment obligations.[644] In other words, where the habitual place of work does not change as a result of the transfer, the affected employees will be able to sue both transferor and transferee before the courts of the place of habitual employment. Employees are even able to sue transferor and transferee in composite proceedings, as the ban on the application of Article 8(former Article 6) in respect of the individual employment contract has lifted with the introduction of the Brussels I Recast.

Where a transfer involves a cross-border relocation of the transferred undertaking, the establishment of the habitual place of employment may prove more difficult. If the employees are required to habitually continue their employment at the foreign place of relocation their habitual place of employment is deemed to have change as no *animus revertendi* or *retrahendi* will exist. Since in cross-border transfers of undertakings there exists an intention to permanently perform the work at the new location, the employees habitual place of employment is deemed to have changed from the date of the transfer-related relocation. The affected employees will therefore, on the basis of Article 21(1)(b)(ii) be able to initiate proceedings against the transferee in the courts of the new place of habitual employment.

[643] Article 21(1)(a) Brussels I Recast.
[644] Art. 21(1)(b)(i) Brussels I Recast.

Based on the provisions of the Brussels I Recast, only the courts in the place of origin, i.e. the former habitual place of employment, will have jurisdiction over a transfer-related dispute between the employee(s) and the transferor. As a result, in cases involving a cross-border transfer of undertaking, the application of the existing provisions of the Brussels I Recast in relation claims seeking to enforce individual employment rights may, on occasion lead to the somewhat unsatisfactory result that the transferee cannot be sued in the place from where the transferred undertaking originates, i.e. the former place of habitual employment. In these cases, the affected employees, although having transferred to the transferee, may, for reasons of proximity, ease, language and trust, prefer the place of origin of the undertaking as a forum over the new place of habitual employment.[645] Such a forum however is not available to the employees in their claim against the transferee, save for situations where the place of origin of the undertaking equates to the place of domicile of the transferor and the transferor and transferee are sued in composite proceedings.

*6.1.2 Non-individual employment claims*

In most cases, those seeking enforcement of the non-individual employment rights arising from the Acquired Rights Directive will have to make due with the jurisdictional basis provided by Article 4 of the Brussels I Recast. As such, those seeking enforcement of collective employment interests, the function and status of employee representatives or information and consultation requirements will have to resort to the domicile of the transferee or transferor. In rare cases however, Article 7(5) might offer a solution where the transferred undertaking equates to a secondary establishment of the transferor or the transferee. In these cases the employees will be able to sue in the courts of the place where the undertaking, which constitutes a 'branch, agency or other establishment', is situated, insofar as the claim arises out of the operations of that 'branch, agency or other establishment', which is likely the case in cross-border transfer scenarios.[646]

Generally, the employees, employee representatives and trade unions seeking to enforce non-individual employment rights have to rely on the

[645] Bearing in mind that this place of origin will likely equate to the employee's domicile.
[646] See above, paragraph 5.4.

jurisdictional basis of Article 4 providing jurisdiction to the courts of the Member State of domicile of the transferor or transferee. In this, situations may arise where the place of domicile of transferor or transferee does not equate to the location of the transferred undertaking before or after the transfer or to the place of habitual employment, e.g. in situations where the transferee or transferor is domiciled in a non-Member State. After all, it is imaginable that the statutory seat, central administration and principal place of business of the transferee are not located in the country of origin, relocation or of habitual employment. In most cases, this incongruence is overcome by the application of Article 7(5) Brussels I Recast. After all, in situations where the defendant is located elsewhere, the transferred undertaking could be considered a secondary establishment under Article 7(5) Brussels I Recast, leaving the plaintiffs with the alternative forum of the location of the (transferred) undertaking. However, on rare occasions, where the rights for which enforcement is sought are not considered to constitute a claim out of the operations of the secondary establishment, Article 7(5) will not apply.[647] In these cases, the plaintiffs will be left with a competent court which has no geographic proximity to the dispute, which may be considered inequitable, especially in cases of a transfer of undertaking where the employee has become attached, by operation of law, to an employer whom he has not freely chosen.

*6.1.3 Outbound transfer*

In outbound transfer scenarios an undertaking is transferred from a Member State to a non-Member State, meaning that the transfer is coupled with a cross-border relocation to a country outside the European Union. In these cases, all actors involved in a transfer of undertaking will have difficulty initiating proceedings, against a foreign transferee, in a Member State court (on the basis of the Brussels I Recast). If, in addition to the cross-border relocation, the transferee is domiciled in a non-Member State, e.g. the state of relocation, the Brussels I Recast will not apply.[648] This is only different in a few specific situations. For example, where it concerns the individual contract of employment, an extended concept of domicile is utilized. As such, Article 20(2) enables employees to, in disputes relating to a transfer of

[647] See above, paragraph 5.4.

[648] The same holds true where it concerns any other non-Member State domiciled defendant, such as e.g. the transferee.

undertaking, sue a non-EU domiciled transferee in the courts of the Member State where the transferred undertaking is located, if by reason of the transfer the transferred undertaking has become a dependent branch or establishment.[649] In outbound transfer scenarios this provision however does not offer a solution to the inability to initiate proceedings against a non-Member State transferee before the courts of a Member State as the secondary establishment mentioned in Article 20(2) will have transferred to a non-Member State as a result of the relocation. A solution is neither offered by Article 21(2) which attributes jurisdiction to the court of habitual employment in case of a claim against a non-Member State employer. In outbound transfer scenarios, depending on whether the employee decides to continue his employment with the transferee, the relocation of the undertaking will likely result in the emergence of a new habitual place of employment. In these cases, employees are therefore unable to sue a non-Member State transferee on the basis of the Brussels I Recast: the transferee as defendant falls outside the formal scope of the regulation and under the exceptions to the formal scope the rules on jurisdiction do not point towards the courts of a Member State, leaving the Brussels I Recast unable to provide a competent court, which is a wholly unsatisfactory result. After all, in outbound transfer scenarios the undertaking to be transferred is located within a Member State, as are the affected employees. More so, prior to the transfer these employees are likely to habitually carry out their employment within the Member State of origin. It are the transferor and transferee that have, by reason of the transfer willingly subjected not just themselves but also the affected employees to the jurisdiction of another Member State. The transferor will generally have agreed to the (foreign) person of the transferee or the cross-border relocation that accompanies the transfer. The transferee, on the other hand, has voluntarily acquired a foreign undertaking. The employees however cannot exert any influence over the effectuation of the transfer, the person of the transferee or the location of the transferred undertaking upon or immediately after the transfer. On the date of the transfer all rights and obligations transfer to the transferee by operation of

[649] For Article 20(2) to have effect the dispute must arise out of the operation of the branch or establishment, which is undoubtedly the case where it concerns a dispute arising from a transfer of undertaking, i.e. the transfer of the brand or establishment within the meaning of Article 20(2).

law. Such a transfer is initiated within the Member State where the undertaking to be transferred is located. In the absence of a Member State court having jurisdiction there exists no geographic proximity to the pivot of the Acquired Rights Directive, i.e. the undertaking being transferred, which is at odds with the protective nature of the directive.

*6.1.4 Conclusion*

The Brussels I Recast offers no special jurisdictional category for transfers of undertakings, leaving any claim stemming therefrom to be accommodated by the various provisions on jurisdiction that exist within the regulation. It may be argued that the concurrence of the claims arising from a transfer of undertaking under a single rule or category of jurisdiction is to be preferred, however, the Brussels I Recast leaves no room for such concurrence of claims other than under the general rule which affords jurisdiction to the *forum rei*. The subsumption of all claims arising from a transfer of undertaking under this general category would conflict with the protective nature of the Acquired Rights Directive and would defy procedural efficiency and fairness by quite possibly resulting in a loss of proximity between the adjudicating court and the dispute. Subsuming all transfer-related claims under the category for individual employment contracts does not offer a solution either. After all, in addition to individual interests the Acquired Rights Directive and its national counterparts inhabit certain operational, economic and collective employment interests which are difficult to reconcile with the special rules on jurisdiction for disputes relating to individual employment contracts. More so, although opaque at times, the Brussels I Recast in most transfer-related cases provides sufficient access to justice. However, in certain specific cases, most notably in relation to non-Member State defendants (in all likelihood the transferee), the provisions of the Brussels I Recast provide a highly unsatisfactory result. These cases do not appear to fit in well with the existing jurisdictional regime. As such, the following paragraph will suggest a solution to this problem.

*6.2 Proposed changes to the Acquired Rights Directive*

In light of the findings in the previous (sub)paragraphs, the present paragraph seeks to provide a solution to the absence of jurisdiction for Member State courts in outbound transfer scenarios and other problems

relating to of a lack of proximity existing between the competent court and the transfer-related dispute. Although it may be difficult to establish which jurisdictional rule is to apply to specific claims arising from a transfer of undertaking, the Brussels I Recast in most cases provides sufficient access to justice. Instead of providing a new, separate jurisdictional category for transfers of undertakings, it is therefore preferred to provide an additional ground for jurisdiction within the Acquired Rights Directive. This rule should serve as a single (additional) jurisdictional base for all claims seeking to enforce rights and obligations stemming from a transfer of undertaking. In this, claims arising from a transfer of undertaking would benefit from a jurisdictional rule that is not plagued by complexity and ambiguity and that has the advantage of being easily applicable and of providing legal certainty and predictability. Since the undertaking to be transferred is pivotal to a cross-border transfer of undertaking, the jurisdiction of the courts of the Member State of the location of such undertaking is desirable. As such, the Acquired Rights Directive should, akin to the Posting of Workers Directive,[650] include a rule on jurisdiction additional to those existing within the Brussels regime. A provision encompassing such a rule could be structured as follows:

> 'In order to enforce the rights and obligations stemming from this directive, proceedings may be instituted in the Member State in which the undertaking to be transferred is situated upon or immediately prior to the transfer without prejudice, where applicable, to the right, under existing international conventions and regulations on jurisdiction, to institute proceedings in another State.'

[650] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services *OJ* [1997] L18/1, which in Article 6 provides a specific provision on jurisdiction; *Cf.* the upcoming revision of the Posting of Workers Directive: Proposal for a Directive of the European Parliament and of the Council amending Directive 96/71/EC of The European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services COM(2016) 128 final.

# Chapter 4 - Conflict of laws

## 1. Introduction

In response to economic globalization, as the previous Chapters have signalized, there has been a considerable influx in cross-border mergers, acquisitions and corporate restructuring activities over the last decades. The removal of trade barriers, the internationalisation and integration of capital markets,[651] the establishment of the European Monetary Union and new technological developments are driving forces to enhancing corporate mobility throughout Europe. In this, economic globalization denotes an increased integration of economic markets attributed to a rise in cross-border trade and a rapid spread an development of new technologies,[652] a process which has evoked a pattern of increased cross-border business activities. More so, the European Commission believes that the growing integration of Member State economies will only increase the number of cross-border transfers of undertakings.[653] The prospect of increasing cross-border transfers of undertakings has been a consistent factor in the establishment and development of the Acquired Rights Directive which was originally enacted to deal with the rise in international takeovers and amalgamations that would inevitably arise from the creation of a Common Market.[654] Since the differences existing in the national laws of the Member States as regards the protection of employees in the event of a transfer of undertaking could have a direct effect on the functioning of the Common Market, the directive seeks to reduce these differences by promoting the approximation of the laws of the Member States with regard to safeguarding the rights of employees in the event of transfer of undertaking. Considering the absence of EU competence in effectuating a unification of the labour laws of the

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[651] *Cf.* Green paper 'Building a Capital Markets Union', COM [2015] 63 final, according to which investment in European companies and infrastructure

[652] Shangquan, p. 1-2. A rapid development of new technologies is also considered a main driver of the integration of capital markets. See COM [2015] 63 final, p. 25.

[653] Commission services' working document. Memorandum on rights of workers in cases of transfers of undertakings [2004], p. 11-12, available online at:
<http://ec.europa.eu/social/BlobServlet?docId=2444&langId=en>.

[654] Nowadays frequently referred to as internal market.

Member States[655] the approximation of laws is attempted by means of partial harmonization.[656] Consequently, the national systems (were to) provide minimum standards of employment protection that may only be departed from *in melius.*[657] Not only does the directive allow the Member States to impose measures more favourable to the affected employees, it also leaves several key aspects, such as the concepts of 'employee', 'employment relationship' and 'employee representative' to be defined by national law.[658] Although hypothetically a harmonization of laws would effectuate a certain conformity and unification of the substantive laws of the Member States rendering the conflict of laws ineffective, in actuality the conflict of laws is only rendered superfluous when a directive is equally transposed throughout the Member States and the Member States are not provided with any leeway in transposing the directive.[659] Where it concerns the Acquired Rights Directive wide variations in national employment law combined with the effects of partial harmonization indicate that conflict of laws rules continue to play a crucial role in establishing the appropriate legal regime in cross-border transfer situations. The issue of cross-border transfers of undertakings is therefore inextricably linked to the conflict of laws. Whereas increased interconnectedness and international migration may give rise to an influx in cross-border commercial dealings and thus to cross-border transfers of undertakings, the existing legal diversity highlights the need for the conflict of laws, i.e. the determination of the law applicable to a cross-border transfer of undertaking. With legal diversity and cross-border legal relationships

[655] The founding treaties did not confer any competence on the EU to enact legislation in the field of labour law save for the free movement of workers. Labour law legislation was therefore enacted on the basis of the competence existing for the internal market. The Single European Act provided the EU with the power to establish legislation with regard to employment health and safety in Article 118a EC whereas Article 153(1) TFEU, introduced by the Treaty of Amsterdam, provides the EU with a supportive and complementary competence allowing the enactment of directives effectuating partial harmonization. See: Mańko 2015, p. 9-10; Riesenhuber 2012, p. 141.

[656] *Cf.* Hepple 2005, p. 190.

[657] Article 8 Directive 2001/23/EC; Article 7 Directive 77/187/EEC; Guibboni 2006, p. 235 *et seq*.

[658] *Cf.* Commission Report on Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, COM[2007] 334 def. , p. 5; Davies 2012, p. 228 *et seq*.

[659] *Cf.* Krebber 1998, p. 124 *et seq*.

forming preconditions for the existence of private international law, the issue of cross-border transfers of undertakings undoubtedly holds some questions of private international law.[660] More so, the previous Chapters have shown that the problems arising from or in relation to cross-border transfer of undertakings are largely rooted in the differences existing between the laws of the Member States and the absence of a clear and universally accepted conflict of laws path. Whereas these Chapters have served to highlight the need for clear and uniform conflict of laws provisions regarding transfers of undertakings at a European plane, the present Chapter seeks to assess and define the rules that determine the applicable law in the event of a cross-border transfer of undertaking. As the following will show, there exists a large variety of views and ideas on the method through which the law applicable to a transfer of undertakings is and should be obtained. This Chapter first seeks to establish and identify the existing method through which the law applicable to a cross-border transfer of undertaking is to be determined. Second, several views and ideas on the appropriate conflict of laws method are evaluated and discussed. The ultimate aim of this Chapter is to assess and identify the present conflict of laws regime in relation to cross-border transfers of undertakings and to determine whether this regime should be upheld or is in need of revision. In achieving this aim several questions arise ranging from the classification under the conflict of laws to the influence of primary and secondary European Union law on the conflict of laws and the conflict of laws connection. Prior to addressing these issues, this Chapter provides a historic overview of the conflict of laws in relation to the Acquired Rights Directive.

## 2.History

The area of employment law constitutes a relatively new legal field, especially compared to that of commercial law, company law and the conflict of laws. In a 1962 memorandum the European Commission first signaled the importance of a social policy complementing the European Community's core activities:

[660] Although legal diversity is an inevitable result of partial harmonization it is difficult to reconcile with the internal market considerations upon which the directive is built.

> 'If we consider the ultimate aim of the Treaty, i.e. an ever closer union among the peoples of Europe, there can be no doubt in our minds that pursuit of an advanced social policy must form an indispensable part of the Community s activities, especial1y if the European edifice is to have a solid foundation in the real support of the workers who make up the vast majority of the population of our countries. The aims of the Community are as much social as economic, and the former cannot be regarded solely as a consequence of the latter but should also be achieved as the result of action taken for social reasons. Even if some of the rules, principles and instruments that the Treaty lays down in the social field relate in the first place to economic needs and serve economic ends, they are unquestionably to be looked at now, within the general framework of the Treaty, as principles and rules of social policy, and they must be implemented as such. The fact that social questions, though very much to the fore at the national level, might seem to be still ill-defined at Community level cannot justify a "passive" social attitude on the part of the Community s institutions.'[661]

The Commission considered it vital for the European Community to have a social policy complementing, but not subordinate to, other types of Community policy.[662] Next, the European social dimension, which was discovered during the Paris Summit of 1972,[663] came to a rise during the nineteen seventies with the establishment of the first European directives on social policy. These European directives relate to gender equality,[664] collective redundancies[665] and transfers of undertakings.[666]

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[661] Memorandum of the Commission on the action programme of the Community for the second stage, COM (62) 300, p. 44.

[662] COM (62) 300, p. 45-46.

[663] During the summit, vigorous action in the social sphere was considered important. it was decided that a social action programme was to be completed before 1 January 1974, Meetings of the Heads of State or Government Paris 19-21 October 1972, The First Summit Conference of the Enlarged Community, *Bull. EC* 10-1972, p. 19.

[664] Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women; Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

[665] Council Directive 75/129/EEC of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies.

*2.1 Proposals of 1974 and 1975*

Although originally aimed to complement a surge in international takeovers and amalgamations, the present Acquired Rights Directive, i.e. Directive 2001/23/EC, is not equipped with any accompanying (express) choice of law provisions. Surely, Article 1(2), as briefly pointed out in the previous Chapter, may be construed as a scope rule with certain choice of law implications, it does not however, expressly state which national acquired rights provisions are to apply in cross-border transfer situations. Earlier drafts of the directive did, to some extent, take account of the possible conflict of laws implications of a cross-border transfer of undertaking. The original proposal for a directive of 1974 did not contain an express conflicts of laws provision with regard to which law was to apply to a transfer of undertaking *per se*. In other words, it did not expressly provide which national acquired rights provisions were to apply to a cross-border transfer of undertaking.[667] It did however, in Article 10, provide a conflict-of-laws provision, encompassing specific conflict of laws rules with respect to the individual employment relationships affected by the transfer of undertaking:

> '1. The labour laws of a Member State which are applicable to employment relationships prior to the merger or takeover shall also apply after the merger or takeover has taken place.
> 2. Paragraph 1 of this Article shall not apply where the place of work of the employee is transferred in a valid manner to another Member State or where the application of another body of labour law is concluded with the employee in a valid manner. Rights which were explicitly or implicitly included in the employment contract or which result from customary industrial practice shall, however, remain unaffected.'[668]

[666] Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses.

[667] Article 10 of the proposal therefore did not encompass a conflict of laws provision regarding the transfer of undertaking itself or the territorial application of the directive. *Cf.* Wimmer 1995, p. 207; Hepple 1998, p. 5, 7; Kania 2012, p. 77.

[668] Proposal for a Directive of the Council on harmonization of the legislation of Member States on the retention of the rights and advantages of employees in the case of mergers, takeovers and amalgamations, COM (74) 351 final/2; V/631/74-E.

In the accompanying Explanatory Memorandum, the Commission recognizes that an employee's place of work generally does not change as a result of a merger or takeover.[669] Even in the event of an international takeover or merger, the changes in the structure of the company will generally not warrant a change in the habitual place of work. As a result, the law that applies to the employment relationships remains unchanged upon a transfer of undertaking. Nonetheless, it is perceivable that the law that applies to the employment relationship does change in connection with a transfer of undertaking. To this end, the Commission distinguishes three cases: (1) the employee is posted to another country, (2) the entire undertaking is relocated to another Member State and (3) an agreement is concluded with the senior staff on arrangements concerning labour legislation which will apply to the undertaking's head office abroad.[670] In these cases, a change in the law that applies to the employment contracts or relationships is considered permissible. The general conflict of laws rules that exist for determining the law that applies to such contracts or relationships continue to apply.[671] Hence, as stated above, the 1974 proposal and the conflict of laws provision contained therein did not specifically address the issue of which national acquired rights provisions are to apply in the event of a cross-border transfer of undertaking. What is clear however, is that a cross-border transfer of undertaking that is e.g. coupled with a simultaneous or subsequent relocation may effectuate a change in the law applicable to the individual employment contract. In this sense, a change in place of work that is the result of a cross-border transfer of undertaking is, not surprisingly, equated to any other change in the habitual place of employment of an employee. Indeed, in the absence of any choice of law provision contained in the employment contract a change in the habitual place of employment generally effectuates a change in the law governing the individual employment contract.

The revised proposal of 1975, although clearly applying to cross-border transfers of undertakings,[672] did not comprise any conflict of laws

[669] COM (74) 351 final/2, p. 12.
[670] COM (74) 351 final/2, p. 13
[671] COM (74) 351 final/2, p. 13.
[672] See COM (75) 429 final, Explanatory Memorandum p. 5-6; Chapter 2, para. 3.

provisions. The Commission eventually refrained from equipping the Acquired Rights Directive with provisions on the conflict of laws, as it was believed that this issue would be dealt with by the Regulation on the provisions of conflict of laws on employment relationships within the Community.[673] The draft Regulation of 1972 envisioned, in Article 3, that employment relationships would be governed by the employment and labour laws of the State in which the undertaking of employment, i.e. the undertaking through or by which the employee was employed, was located. The draft Regulation allowed a few exceptions to this general rule. First, where an employee was engaged by an undertaking in a Member State and transferred to an undertaking belonging to the undertaking of employment in another Member State, the law of the former state (i.e. the location of the engaging undertaking) was to continue to apply to the employment relationship.[674] Second, the employment relationship of employees that were temporarily posted abroad would continue to be governed by the labour laws in force at the location of the posting undertaking, i.e. the location of the establishment sending the workers.[675] Finally, where employment entailed a frequent change in the place of work, the parties could conclude a written agreement subjecting the employment relationship to the labour laws in force at the location of the engaging company or at the place where the employees conducted most of their work activities.[676] In Article 4(2) the

[673] Draft Regulation on Conflict of Laws in Employment Matters, *OJ* [1972] C49/26; Opinion of the Economic and Social Committee, *OJ* [1972] C142/5; Amended proposal for a Regulation of the Council on the provisions of conflict of laws on employment relationships within the Community COM(75) 653 final; Hepple 1998, p. 7; Kronke 1989, p. 3.

[674] *OJ* [1972] C49/27, Article 4: '*indien tot een onderneming, die haar zetel in een Lid-Staat heeft, bedrijven in een andere Lid-Staat behoren, mag worden overeengekomen dat op werknemers, die uit het land van de zetel van de onderneming overgeplaatst worden naar deze bedrijven, in plaats van het arbeidsrecht dat geldig is op de plaats van het bedrijf van tewerkstelling, het arbeidsrecht wordt toegepast dat geldt op de plaats van de zetel van de onderneming(...)'*.

[675] *OJ* [1972] C49/27, Article 5(1): '*Op werknemers die, zonder de voor toepassing van artikel 6 voorgeschreven voorwaarden te vervullen, door hun bedrijf naar andere Lid-Staten worden uitgezonden voor een tijdelijke werkzaamheid in de zin van de op grond van artikel 51 van het Verdrag tot oprichting van de Europese Economische Gemeenschap uitgevaardigde voorschriften inzake de socialezekerheid van migrerende werknemers, blijft het arbeidsrecht van toepassing dat geldt ter plaatse van de uitzendende onderneming.'*

[676] *OJ* [1972] C49/28, Article 6: *'Met werknemers, wier werkzaamheid een veelvuldige wisseling meebrengt van de plaats waar zij de arbeid verrichten zonder dat zij bij een ander*

proposed regulation mentioned several provisions that cannot be precluded by the aforementioned exceptions to the general rule. This Article did not make specific mention of any acquired rights provisions; no reference was made to the Acquired Rights Directive and the issue of transfer of undertakings was not specifically dealt with in the proposed regulation. The revised proposal for the regulation provided several changes, the most notable being a change in conflict of laws reference of the general rule.[677] According to Article 3(1) of the amended proposal workers would, in principle, 'be subject to the laws relating to employment of the Member State in which they normally carry out their employment.' Still, the proposal contained no specific mention of the issue of (cross-border) transfers of undertakings. More so, the Commission seized its work on the regulation by withdrawing the proposals in 1981, leaving the Acquired Rights Directive without the envisaged complementary conflict of laws provisions on employment matters.[678]

*2.2 Directives 77/187/EEC, 98/50/EEC and 2001/23/EC*

Express conflict of laws provisions, directly affirming which national acquired rights provisions apply in cross-border transfer situations, remain absent from the present Acquired Rights Directive, as well as from its predecessors, i.e. Directive 77/187/EEC and Directive 98/50/EC. Complementary conflict of laws provisions, indisputably applying to transfers of undertakings, also remain inexistent.[679] The Commission commissioned a study, completed in 1998,[680] on the legal consequences of cross-border transfers of undertakings within the European Union. This study, conducted by *Hepple*, recognizes the difficulties that may arise from the absence of any express conflict of laws provisions regarding transfers of

*dan hun oorspronkelijk bedrijf worden ingedeeld, kan bij arbeidsovereenkomsttoepassing worden overeengekomen van het arbeidsrecht dat geldt op de plaats van het oorspronkelijke bedrijf, dan wel van het arbeidsrecht dat geldt ter plaatse waar zij het grootste deel van hun werkzaamheden verrichten. De overeenkomst moet schriftelijk worden aangegaan.'*

[677] COM(75) 653 final.

[678] *Cf.* Hepple 1998, p. 8.

[679] Surely, it may be argued that the Acquired Rights Directive itself contains a scope rule with direct conflict of laws implications or that transfers of undertakings are to be governed by the law that governs the individual contract of employment by reason of the Rome I Regulation. These are all issues that are dealt with below.

[680] Hepple 1998.

undertakings and recommends that the Acquired Rights Directive should provide:

> 'that, where the Posted Workers Directive does not apply (below), the applicable law should be that of the Member State in whose territory the undertaking or part of the undertaking being transferred is situated on the date of a transfer, notwithstanding (a) that the transfer is governed or effected by the law of a country outside that Member State, or (b) that persons employed in the undertaking or part transferred habitually work outside that State, or (c) that the employment of any of those person is governed by any such law.'[681]

As such, the laws in force at the location of the transferred undertaking prior to the completion of the transfer (i.e. on the date of the transfer), according to *Hepple,* shall constitute the applicable law. Additional recommendations in situations concerning cross-border transfers of undertakings had regard to the definition of employee and employee representation. In the absence of application of the Posted Workers Directive, *Hepple* recommends that 'the definition of contract of employment or employment relationship is that of the Member State in whose territory the undertaking or part of an undertaking being transferred is situated on the date of the transfer.'[682] Since the directive leaves it to the Member States to determine the personal scope of the directive by applying to those protected as employees under national law,[683] the personal scope of the directive may vary depending on the national law that is applied. As per Article 3(1) of Directive 77/187/EEC the rights and obligations stemming from an employment contract or employment relationship shall transfer to the transferee by reason of the transfer. As such, it is important to establish who qualifies as having an employment contract or employment relationship with transferor on the date of the transfer, in other words: who is protected as an employee by the Acquired Rights Directive. By subjecting the definition of contract of

[681] Hepple 1998, p. 20-21.
[682] Hepple 1998, p. 40, para. 14.3.
[683] See Chapter 2; Article 2(1)(d) Directive 2001/23/EC: "employee" shall mean any person who, in the Member State concerned, is protected as an employee under national employment law; this subsection was not included in Directive 77/187/EEC and as such not part of the Directive described by Hepple.

employment or employment relationship to the laws of the Member State in whose territory the undertaking or part of an undertaking being transferred is situated on the date of the transfer, possibly conflicting applications of the directive are eliminated. In a third recommendation *Hepple* proposes to amend the wording of Article 5 of the directive, by stating that the 'law applicable to determine whether there is proper representation for the purposes of the third paragraph shall be the law of the Member State in whose territory the transferred undertaking is situated on the date of a transfer.' To my mind, the wording of this last recommendation is somewhat ambiguous. A literal reading suggests that the law of the Member State in whose territory the *transferred* undertaking, i.e. the undertaking that has been transferred to the transferee, is situated on the date of the transfer shall be applied in determining whether there is proper representation. In this sense, if the transfer is coupled with a simultaneous relocation to e.g. the country of the transferee on the date of the transfer the laws in force in the Member State of the transferee shall determine whether there is proper representation. Judging from the wording of the report however, this is clearly not what is intended by the recommendation. Referencing the proposal for the 10th company directive on cross-border mergers *Hepple* introduces the problem of the so-called '*Flucht aus der Mitbestimmung'* which arises when undertakings are transferred from Member States with strong participation rights to States with lesser participation rights.[684] His recommendation is intended to ensure the protection of national systems of employee representation.[685] In fact, he states that the 'general rule as to conflict of laws proposed above is that the applicable law should be that of the Member State in whose territory the transferred undertaking is situated. This will enable that Member State to protect its system of employee representation. In order to prevent avoidance of this by local management where there is a shift in the central administration to another country as a result of a cross-border transfer, it is recommended that the wording of the proposed revision of Art. 5(1) be amended.' Thus, it seems to me that the law that should be decisive in order to prevent a *Flucht aus der Mitbestimmung* is the law of the Member State is which the undertaking *to be transferred* is situated, i.e. the law of the Member State in which the

[684] Hepple 1998, p. 42, para. 16.1.
[685] Hepple 1998, p. 42, para. 16.1.

undertaking is situated immediately prior to the transfer. The use of the phrasing *transferred* instead of the more precise *to be transferred* or *being transferred,* which *Hepple* does utilise in his recommendation for the general rule, gives rise to unnecessary confusion. In fact, it leaves me to wonder whether in his recommendation, *Hepple,* did not intentionally opt for the laws in force in the state of relocation. This however, is not in line with arguments put forward in the report nor does it meet the aim and purpose of the directive. Regardless, the recommendations made in the report did not make it into the 1998 directive, which merely involved a codification of the existing case law of the European Court of Justice. The present Acquired Rights Directive, i.e. Directive 2001/23/EC, consolidated the Directives 77/187/EEC and 98/50/EC without any amendments. Thus, the present directive largely corresponds to the original, concluded in 1977. Express provisions on cross-border transfers of undertakings and the conflict of laws still remain inexistent as do any complementary conflict of laws provisions, indisputably applying to transfers of undertakings.

*2.3 Recent developments*

In recent years, the issue of cross-border transfers of undertakings has regained the interests of the European Commission, leading to the consultation of social partners with a view to amending the directive. This paragraph aims to discuss the efforts of the European Commission in revising the Acquired Rights Directive in light of cross-border transfers of undertakings and the reports issued to aid the decision on the necessity of such a revision.

*2.3.1 CMS report*

A 2006 report completed by the CMS group, in particular by *Gaul, Jeffreys, Tinhofer* and *van Wassenhove,* aimed to identify the main legal and technical problems arising from the applicability of the Acquired Rights Directive to cross-border transfers of undertakings. In identifying these problems the authors specifically address the issue of the conflict of laws. The report was concluded during the time that, with regard to the EU Member States, the Rome Convention was still the primary international instrument regulating the applicable law to contractual obligations in situations involving a choice

between the laws of different countries.[686] Even though the Rome Convention, at a European level, has since been surpassed by the Rome I Regulation the reasoning of the report can be equally applied to the latter. Without specifically addressing the issue it is clear from the report that the authors believe the transfer of undertaking and the bulk of obligations stemming therefrom to be contractual in nature. As such there is no discussion as to whether and on what grounds the issue of cross-border transfers of undertakings falls within the ambit of the Rome Convention. Seeing as the material scope of the Rome Convention confines the application of the instrument to contractual obligations the classification of the issue of transfer of undertakings as contractual undeniably preempts the reasoning that certain provisions of the Convention regulate the law that applies to (certain parts of) a transfer of undertaking. According to the report a distinction has to be drawn between contractual issues, regulated by the Rome Convention, and other legal issues involving the transfer of a business.[687] As such the report states that certain parts of a transfer of undertaking such as the provisions relating to the status and function of employee representatives fall outwith the material scope of the Rome Convention, and are therefore governed by the national laws of the Member States. Since employee participation rights are generally based in the principle of territoriality the report believes these rights to be subject to the laws of the place where the business is located.[688] Generally, the laws in force at the place where a business is situated govern the employment representation and employment participation rights. As such, without specifically addressing the issue of a conflict of laws classification, the report, akin to the Rome Convention, appears to attribute significant meaning to the nature of the instituted claim and the rights and obligations for which enforcement is sought. In doing so, the transfer of undertaking is not considered an independent conflict of laws category nor is it classified as a whole as one legal concept to be governed by a single law. The legal concept of a 'transfer of undertaking' and all rights and obligations stemming therefrom are therefore not entirely governed by a single law, e.g. by assimilation to the employment contract by the laws applicable to the

[686] *Cf.* Article 1(1) Rome Convention.
[687] CMS 2006, p. 64.
[688] CMS report 2006, p. 64.

individual contract of employment. Instead, as may be inferred from the report, a transfer of undertaking is comprised of and divided into several contractual and non-contractual obligations that are to be treated separately under the conflict of laws. Consequently, the report merely details the (conflict of) law(s) as it is, in the perception of the authors, presently applied and leaves the reader unaware of the many different views and ideas that exist in this regard.

Apart from a few issues falling outside the scope of the Rome Convention the report generally assumes that the rights and obligations stemming from the Acquired Rights Directive and its national counterparts are governed by the law that applies to individual contracts of employment on the basis of Article 6 of the Rome Convention. As stated above, the report does not provide any reasoning underlying this classification or any insights into the various views and opinions existing in this regard; it merely states that certain specific transfer related issues should be subject to the law designated by Article 6 of the Rome Convention (similar to Article 8 of the Rome I Regulation:

> 'In our view, this basic rule must apply for deciding which law governs the question of whether the transferee automatically takes over the employment relationships of the employees concerned. The same goes for dismissal and the modification of (contractual terms and conditions.'[689]

In discussing the applicable law to these transfer related issues, i.e. the question of whether the transferee takes over the employment relationships of the affected employees, whether there has been a valid dismissal and whether there has been a (substantial) modification of contractual terms and conditions, the report makes a distinction between cross-border transfers of undertakings that are accompanied by a cross-border relocation and cross-border transfers of undertakings that do not involve a relocation of the transferred undertaking. The latter type of transfer situations generally involves no change in the location of the undertaking and the place of work of the affected employees. Since the primary connecting factor for individual

[689] CMS report 2006, p. 64.

contracts of employment is to be found in the habitual place of employment such transfer situations typically do not result in a change in the applicable law, either to the employment contract itself or to the rights and obligations stemming from a transfer of undertaking. However, in situations involving a simultaneous or subsequent relocation of the transferred undertaking the habitual place of work of the employees employed in the undertaking is likely to change. In this sense a question arises as to when such change in applicable law takes effect. The report argues that the date of the transfer agreement or the date upon which employee actually continues his work at the new location may be decisive.[690] As such it may be that the law that applies to several of the obligations arising from a transfer of undertaking changes when the transfer takes effect or when the employee starts work at the new location. Since there still remain differences in the national acquired rights provisions of the Member States such a change in applicable law may give rise to several difficulties. The report therefore proposes amending the Acquired Rights Directive in this regard:

> 'First, given that the main problems arising from the application of the Directive on cross border transfers stem from determining which national law applies to the transfer the Directive should introduce rules aimed at determining the law applicable to employment contracts in situations where there may be a conflict between the laws of different Member States.'[691]

Here, the report recognizes that the main problems in situations involving a cross-border transfer of undertaking find their basis in conflicting Member State laws and the absence of a clear conflict of laws solution. In addition, the preceding citation shows that the authors believe that the solution in determining the applicable national law to a transfer of undertaking stems from the law that applies to the individual employment contract. After all, the report proposes the introduction of specific conflict of law rules for individual employment contracts in order to counter the problems that arise from determining which national law applies to the transfer. The rule or

[690] CMS report 2006, p. 65.
[691] CMS report 2006, p. 83.

connecting factor that is subsequently presented is incomprehensible and may be difficult to reconcile with the existing conflict of laws regime:

> 'As a general rule, except when the applicable law of both Member States can be observed (for example concerning the information and consultation obligation of the workers where each employer has to respect the applicable law of the Member State in which it is located) we consider that the governing law (for contractual issues) should, in most cases, be the applicable law of the Member State in which the transferor is located (unless the undertaking is not located in the same Member State, in which case the law of the undertaking's member State should apply), since the Directive is intended to protect the rights of the transferred workers. Their rights should then be preserved in line with the protection offered by their Member State (the initial conditions.) However, a transitional period could be provided for, to give the transferee the opportunity to harmonise the employment conditions.'[692]

First, as a general rule the conflict of laws seeks to resolve issues involving conflicting laws by designating a single law to govern the legal relationship rather than opting for a cumulative application of both laws. Such a cumulative approach will, in most cases, only prove feasible if there is no conflict between the laws seeking application.[693] Second, the report proposes the location of the transferor as a possible connecting factor for the contractual issues arising from a transfer of undertaking. This proposed conflict of laws rule, although highly practicable, is vaguely formulated. Given its pivotal role in the Acquired Rights Directive the seat of the undertaking to be transferred may well embody the most natural connecting

[692] CMS report 2006, p. 83.

[693] The report states that the absence of a conflict of laws exists in situations involving the information and consultation requirements arising from the Directive. According to Article 7 of Directive 2001/23/EC transferee and transferor are required to inform the representatives of their respective employees of certain transfer related issues. This provision however, has not been equally transposed throughout the Member States. As such, there are certain Member States, such as Germany and Austria that impose a common duty on the transferee and transferor to inform individual employees. 'Zur Unterrichtung der Arbeitnehmer sind der bisherige Arbeitgeber oder der neue Inhaber verpflichtet. Beide sollen sich untereinander verständigen, in welcher Weise sie ihre Informationspflicht erfüllen.' *BT-Drucks* [2001] 14/7760. Therefore the absence of any conflicting laws in this regard seems far-fetched.

factor in determining the law that applies to a transfer of undertaking and the rights and obligations stemming directly therefrom. The proposed conflict of laws rule, however, primarily seeks connection to the location of the transferor, with the exception that in situations where the undertaking is not located in the Member State of the transferor the laws in force in the Member State of location of the undertaking are to apply. As such it is not the location of the transferor but rather the location of the undertaking (to be transferred) that is considered decisive. Thus the report could have discarded its equivocal phrasing by simply stating that the location of the undertaking (to be transferred) is decisive in determining the applicable law. More so, the proposed conflict of laws rule is only intended to apply to contractual issues. Assuming this refers to the contractual issues arising from a transfer of undertaking, the report does not intend to subject the entirety of the rights and obligations arising from a transfer of undertaking to a single law, designated by a single connecting factor. As such it does not propose the introduction of the transfer of undertaking as a separate reference category under the conflict of laws. Rather, the report aims to introduce a rule 'aimed at determining the law applicable to employment contracts in situations where there may be a conflict between the laws of different Member States'. The proposed rule appears to require incorporation into the Acquired Rights Directive and seeks application in derogation of the general rules that aim to determine the law that applies to individual contracts of employment. Apparently, even though this is not specified in the report, such a rule is intended to take priority over the Rome Convention and Rome I Regulation as a *lex specialis*. Surely as per Article 23 of the Rome I Regulation special supremacy is awarded to Community legislation which lays down specific conflict of laws rules relating to contractual matters in specific matters, such as European directives.[694] As such, this provision, which lays down the latin maxim of *lex specialis derogat legi generali,* would ensure the prevalence of a conflict of laws provision incorporated in the Acquired Rights Directive over any conflicting provisions contained in the Rome I Regulation. Yet in incorporating a special conflict of laws provision into the Acquired Rights Directive one has to pay mind to the likelihood with which the proliferation of isolated conflict of laws provisions throughout secondary Community law will thwart legal certainty. This issue was already raised in legislative history

[694] A similar provision may be found in Article 20 of the Rome Convention.

during the preparation of the Rome I Regulation.[695] In an effort to provide more clarity to the relationship between the Rome I Regulation and conflict of laws provisions contained in secondary Community law, such as employee protective directives, Article 22(a) of the proposed Rome I Regulation provided for the prevailing application of special conflict of laws provisions laid down in a listed number of directives.[696] Seeking to better align the Rome I Regulation with the Rome II Regulation the European Parliament ensured that this provision did not make it into the final wording of the regulation.[697] Still, the difficulties in determining the relationship between the conflict of laws provisions of the regulation and those included in secondary Community law remain. Including a special provision in the Acquired Rights Directive aimed at 'determining the law applicable to employment contracts' in the event of a transfer of undertaking[698] may therefore impair the reliability of the body of conflict rules existing within the European Union rather than serve to its benefit. The proposed addition to the Acquired Rights Directive would consequently be more practicable if it were included in the Rome I Regulation or if it were accompanied by a provision excluding the issue of transfers of undertakings from the scope of the Rome I Regulation. The latter, although to be preferred, may prove more difficult, since the proposed conflict of laws provision, as mentioned above, does not appear to foster the inception of a transfer of undertaking as a separate conflict of laws category. In fact, the proposed provision only seeks to determine the applicable law to an individual employment contract in the event of a transfer of undertaking and remains silent on the law that is to

[695] Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernization, COM(2002) 654 final, p. 17-18.

[696] Annex I listed only four directives: Directive on the return of cultural objects unlawfully removed from the territory of a Member State (Directive 7/1993/EC); Directive concerning the posting of workers in the framework of the provision of services (Directive 71/1996/EC); Second non-life insurance Directive (Directive 357/1988/EEC, as amplified and amended by Directives 49/1992/EC and 13/2002/EC); Second life assurance Directive (Directive 619/1990/EEC as amplified and amended by Directives 96/1992/EC and 12/2002/EC) and most notably excluded several key directives in the area of consumer law.

[697] Draft European legislative Resolution on the proposal for a regulation of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I) COM(2005)0650 – C6-0441/2005 – 2005/0261(COD), Amendment 58.

[698] CMS report 2006, p. 83.

govern the remaining employment effects of a cross-border transfer of undertaking, some of which may be beyond the scope of the Rome I Regulation and do not appear to be captured by any conflict of laws provision that is universal among the Member States whereas others, such as the effects on the collective employment contracts do fall within the scope of the Rome I Regulation but fall outside the scope of the specific provision on individual contracts of employment. The proposed conflict of laws provisions for employment contracts is therefore best described as inadequate; it merely deals with some of the conflict of laws issues that arise in the event of a cross-border transfer of undertaking. Yet regardless of the report issued by *Gaul, Jeffreys, Tinhofer* and *van Wassenhove* and its merits, the present Acquired Rights Directive still operates without any accompanying conflict of laws provisions explicitly determining which national acquired rights provisions are to prevail in the event of a cross-border transfer of undertaking.

*2.3.2 Legislative efforts*

In a 2007 report[699] the European Commission revealed its intentions to initiate a consultation of social partners with a view to amending the Acquired Rights Directive in order to better accommodate cross-border transfers of undertakings:

> 'The Commission believes, however, that the absence of explicit treatment of cross-border transfers in the Directive, which nevertheless applies to transfers in which the undertaking being transferred falls within the territorial scope of the Treaty, can cause uncertainty on the part of employers and employees. Furthermore, the Commission believes that the enlargement of the EU and the consolidation of the internal market, globalisation and the facilitation of cross-border activities by the Regulations on the European Company and on the European Cooperative Society, or by the Directive on cross-border mergers, are factors liable to increase the phenomenon of cross-border transfers. Consequently, the Commission believes that the Directive

[699] Commission Report on Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses [SEC(2007) 812].

> could be amended with a view to clarifying this point, thereby contributing to the improvement of the *acquis communautaire*. To this end, it intends to consult the social partners pursuant to Article 138(2) of the Treaty.'[700]

On 20th June 2007, the Commission launched such a first phase consultation of social partners.[701] Pursuant to Article 138(2) of the EC Treaty the consultation of social partners is required before proposals in the social policy field are submitted.[702] In this first phase consultation the Commission recognized that 'the applicability of Directive 2001/23/EC to cross-border transfers with a change in the place of work raises a few important questions that cannot be answered by either the Directive or the existing instruments of private international law.' It therefore enquired whether social partners believed it necessary to amend the Acquired Rights Directive or take any other type of Community action in order to deal with the issue of cross-border transfers that are coupled with a (cross-border) relocation of the transferred undertaking. Since the social partners believed that the existing instruments of Community private international law adequately dealt with any problems of private international law, the Commission decided not to continue its legislative efforts.[703]

**3. Classification**

In establishing the law that applies to (the effects of) a transfer of undertaking, or any other legal relationship, by reason of our Savignian heritage, connection is sought to the legal system to which the legal relationship is most closely connected, i.e. the location of the legal relationship's natural seat. This legal system is determined by the reference

[700] SEC(2007) 812, p. 10.

[701] First phase consultation of social partners under Article 138(2) of the EC Treaty concerning cross-border transfers of undertakings, businesses or parts of undertakings or businesses,

[702] Letter to the social partners by N.G. van der Plas, Director General, European Commission, [2007] 009465, available online at <https://www.google.nl/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&cad=rja&uact=8&ved=0CC0QFjAC&url=http%3A%2F%2Fec.europa.eu%2Fsocial%2FBlobServlet%3FdocId%3D2174%26langId%3Den&ei=B4OSVaqfNcPTygOgoCgBQ&usg=AFQjCNEEJUmQS5po8MsRIAirn17jipEsdw&sig2=p9dxroFJeG0f25DAUafJow&bvm=bv.96783405,d.ZGU>

[703] European Commission, *Industrial Relations in Europe* [2008], p. 135.

rule accompanying a specific category of legal relationships. The compartmentalisation of the conflict of laws has given rise to of a large variety of conflict of laws classes or categories. Each of these classes or categories contains a different conflict of laws reference producing a different substantive result, i.e. designating a different national law as being applicable to a particular legal relationship. The doctrine of classification,[704] also known as qualification or characterization[705] entails a primary consideration in the conflict of laws process[706] and in effect involves the allocation of the legal relationship in dispute as belonging to its naturally complementary conflict of laws category. In other words, the doctrine or problem of classification, as first addressed by *Kahn*[707] and *Bartin*,[708] entails a search for the applicable conflict of laws rules. Determining which law applies to a cross-border transfer of undertaking thus naturally requires the classification of the concept 'transfer of undertaking' under the conflict of laws.[709] To this end, it needs to be established if, under the conflict of laws, a transfer of undertaking amounts to a separate conflict of laws category or whether the transfer is assimilated under a particular category. In addition, it needs to be established whether a transfer of undertaking as a whole befalls one conflict of laws category or whether the various rights and obligations stemming from a transfer of undertaking *per se* require a separate conflict of laws connection. There exists various views and ideas on the classification of a transfer of undertaking and the reference rule to be utilized in order to obtain the applicable law. Whereas some believe a transfer of undertaking and the accompanying social effects to be subject to the law that governs the individual contract of employment others feel that a transfer of undertaking constitutes a separate conflict of laws category best equipped with a reference rule that seeks connection to the undertaking to be transferred.[710] Since the process of classification generally takes place on the basis of the *lex fori* it is for the courts adjudicating a particular matter to decide, on the

[704] *Cf.* Lorenzen 1941 p. 743 *et seq.*
[705] A term first introduced by Falconbridge: Falconbridge 1937, p. 235, 236, 239; Cormack 1941, p. 222 *et seq.*
[706] Described by Siehr as the 'cover-question of private international law': Siehr 2005, p. 40.
[707] Kahn 1891, p. 1-143.
[708] Bartin 1899, p. 1-82.
[709] Rauscher 2013, p. 222.
[710] See e.g. Bittner 2000; Henckel 2012; Haanappel-van der Burg 2015; Haanappel-van der Burg 2016 I.

basis of their national law, how a transfer of undertaking is to be classified. In this, the doctrine of classification attempts to fill a void in the Savignian conflict of laws approach by proceeding from the premise that, by reason of legal diversity, there does not exist a universally accepted natural seat to all legal relationships.[711] A classification *lege fori* would, in principle, enable the European Member States to utilise different classifications for a transfer of undertaking. Such an outcome however appears curious since the concept of a transfer of undertaking is based in European law. Should it be possible for the Member States to attribute different classifications to a legal concept or relationship of European descend?

It is generally accepted that where it concerns international treaties or European Regulations on private international law a classification *lege fori* would diminish the universal or supranational character of the provisions enshrined in such a treaty or regulation.[712] European Regulations on private international law, such as the Rome I Regulation, already provide for an independent or autonomous interpretation of the concepts enshrined in these regulations. As for the Acquired Rights Directive, the Court of Justice of the European Union is tasked with the interpretation of the majority of the concepts contained therein.[713] Since the provisions in the directive and its national counterparts find their basis in European law differences in the classification of a transfer of undertaking throughout the Member States are difficult to imagine. Yet, these differences do appear to exist: within the legislation of the United Kingdom, Malta and Luxembourg a transfer of undertaking appears to be classified as a separate category under the conflict of laws, accompanied by a unilateral conflict or reference rule: whenever the undertaking to be transferred is situated within one of these Member States its national acquired rights provisions require unilateral application.[714] In

[711] Weber 1986, p. 47.

[712] Traest 2003, p. 401.

[713] It is up to the Court of Justice of the European Union to interpret the provisions of a directive as well as to assess whether a specific provision is properly transposed into national law. Cases are referred to the court in a variety of manners on the basis of Art. 258 TFEU; Art. 263 TFEU and Art. 267 TFEU.

[714] Art. L. 127-1 (2) Code du Travail Luxembourg : '*Le présent chapitre s'applique chaque fois que l'entreprise, l'établissement ou la partie d'entreprise ou d'établissement à transférer se situe sur le territoire national du Grand-Duché de Luxembourg.'*; Art. 3(1)(d) Transfer of Business (Protection of Employment) Regulations, *S.L.* 452.85: 'Article 38 of the Act and

Germany on the other hand, the *Bundesarbeitsgericht* ruled against the application of the primary German acquired rights provision as an overriding mandatory rule. Instead, according to the *Bundesarbeitsgericht* the rights and obligations stemming from §613a BGB befall the law that applies to the individual contract of employment. The present paragraph deals with the various views and ideas on the classification of a transfer of undertaking, whether based in legal doctrine or in the laws of the Member States.

*3.1 Separate conflict of laws category*

What is clear from preceding paragraph is that there exists no express conflict of laws provisions dealing with the concept of a transfer of undertaking as a separate conflict of laws category. The rights and obligations stemming from a transfer of undertaking could therefore be dealt with separately under the conflict of laws or could be assimilated as a whole under an existing conflict of laws category, such as e.g. the category existing for individual contracts of employment. Surely if no express provision regarding the applicable law to a transfer of undertaking exists the issue may still be encompassed by the Rome I Regulation on the conflict of laws for

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these regulations shall apply: where and in so far as the undertaking, business or part of the undertaking or business to be transferred is situated in Malta.'; Art. 3(4)(c) the Transfer of Undertakings (Protection of Employment) Regulations 2006, *S.I.* 2006 no. 246 (as amended by The Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014, *S.I.* 2014 No. 16): 'Art. L. 127-1 (2) Code du Travail Luxembourg : '*Le présent chapitre s'applique chaque fois que l'entreprise, l'établissement ou la partie d'entreprise ou d'établissement à transférer se situe sur le territoire national du Grand-Duché de Luxembourg.*'; Art. 3(1)(d) Transfer of Business (Protection of Employment) Regulations, *S.L.* 452.85: 'Article 38 of the Act and these regulations shall apply: where and in so far as the undertaking, business or part of the undertaking or business to be transferred is situated in Malta.'; Art. 3(1)(a) the Transfer of Undertakings (Protection of Employment) Regulations 2006, *S.I.* 2006 no. 246 (as amended by The Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014, *S.I.* 2014 No. 16): 'Subject to paragraph (1), these Regulations apply to: a transfer of an undertaking, business or part of an undertaking or business (which may also be a service provision change) where persons employed in the undertaking, business or part transferred ordinarily work outside the United Kingdom.': Haanappel-van der Burg (Haanappel-van der Burg 2015) does not classify the provisions existing in the United Kingdom as a separate conflict of laws category accompanied by a unilateral conflict of laws provision. She finds that the United Kingdom classifies its provisions on transfers of undertakings as overriding mandatory provisions that override the law governing the individual contract of employment, p. 287.

contractual obligations. There are several views and ideas on how a transfer of undertaking should be dealt with under the conflict of laws. Whereas one view establishes that a transfer of undertaking encompasses a separate conflict of laws category that should be accompanied by a separate conflict of laws reference another finds that the transfer of undertaking may as a whole should be assimilated under the conflict of laws category existing for the individual contract of employment. A third view suggests that a transfer of undertaking does not amount to a separate conflict of laws category, leaving the various effects of a transfer to be dealt with differently under the conflict of laws. The following subparagraphs will show the differences existing in the conflict of laws theories dealing with the issue of cross-border transfers of undertakings. There exist three main views on the most appropriate connecting factor for determining the law that applies to the effects of a transfer of undertaking: connection to the transfer agreement, connection to the location of the undertaking to be transferred and connection to the individual contract of employment. Within each of these views a transfer of undertaking is considered a separate conflict of laws category.[715]

*3.1.1 Connection to the transfer agreement*

A transfer of undertaking is generally the result of an agreement by the transferor and the transferee. According to Article 1(1)(a) of the Acquired Rights Directive the directive applies to 'to any transfer of an undertaking, business, or part of an undertaking or business to another employer as a result of a legal transfer or merger.' Whereas most language versions of the directive utilize the term 'legal transfer', some language versions of this particular paragraph, such as the Dutch and German versions, expressly mention that a transfer of undertaking may result from an agreement.[716] A transfer of undertaking may therefore find its basis in the agreement existing between the transferor and transferee. Since the agreement between the transferor and transferee effectuates an *ex lege* transfer of rights and

[715] There may be some disagreement with this statement amongst those favouring connection to the law governing the individual contract of employment as some of the arguments in favour of connection to the employment contract are also used in favour of subjecting the effects of a transfer of undertaking to different laws and different conflict of laws categories.

[716] NL: 'overdracht krachtens *overeenkomst* of een fusie'; DE: '*vertragliche* Übertragung oder durch Verschmelzung anwendbar';

obligations stemming from the existing employment contracts or relationships it may seem plausible to subject the transfer of these rights and obligations to the law governing the transfer agreement.[717] One of the main advantages of conflictually subjecting the transfer of undertaking and its employment effects to the transfer agreement existing between the transferor and the transferee is that, by doing so, the entire acquisition or transfer of the undertaking by the transferee may be governed by a single law or legal system. In other words, by subjecting the acquisition or transfer and its effects to a single law or legal system, a fragmentation of the effects of the transfer (under several legal systems) will be avoided.[718] As a general rule, the transfer agreement, by reason of party autonomy, will be governed by the law chosen by the parties. By subjecting the employment effects of a transfer of undertaking to the transfer agreement itself, the transferor and transferee will, by reason of a mere choice of law, be able to circumvent mandatory provisions of employment law, such as those transposing the Acquired Rights Directive, and prevent the affected employees from transferring to the transferee. By reason of a choice of law the parties will have the ability to subject the entire to transfer or business acquisition to a law that is absent of any acquired rights provisions. Thus, the application of the law that applies to the transfer agreement existing between the transferor and transferee bears the risk that the employees will be deprived of the protection afforded to them by the Acquired Rights Directive and its national counterparts. For this very reason, the conflict of laws connection to the transfer agreement is consistently rejected throughout legal literature.[719] The transferor and transferee should not be able to choose the law that will govern the effects of the transfer in relation to the existing employment contracts or relationships without the knowledge or consent of the affected employees.[720] The

[717] *Cf.* Zweigert 1958, p. 657 who rejects this approach in favour of the law governing the agreement that is being transferred, such as the employment contract, in light of the employee protective nature of the transfer of rights and obligations stemming from an employment contract.

[718] Pietzko 1988, p. 215; Kronke 1981, p. 159; Kania 2012, p. 82; Franzen 1994, p. 70; BAG 29 October 1992 - 2 AZR 267/92, para. II.2.

[719] Gamillscheg 1959, p. 237; Gamillscheg 1983, p. 359; Junker 1992, p. 233; Pietzko 1988, p. 216; Kronke 1981, p. 159; Kronke 1989, p. 9*;* Mankowski 1994, p. 96; Kania 2012, p. 82-83, Franzen 1994, p. 70; Däubler 1994, p. 124; Niksova 2014, p. 70-71; Bittner 2000, p. 460, footnote 20; Richter 1992, p. 70; Drobnig, Becker & Remien 1991, p. 68.

[720] Kania 2012, p. 83; Richter 1992, p. 68.

application of mandatory provisions of employment law, such as national acquired rights provisions, should not be dependent upon a unilateral decision of the transferee and transferor. In essence, the mere fact that the employees cannot in any way influence the law that will govern the transfer agreement makes that they as weaker parties are deserving of protection. To this end the interests of the affected employees outweigh those of the transferee.[721] The transferee undoubtedly has the opportunity to avail himself of legal advice prior to the transfer, enabling him to discount the transfer of the affected employees into the calculation of the purchase price.[722] The transferee requires no protection under the conflict of laws as any unexpected transfer of employees may be entirely attributable to him. The conflict of laws connection to the transfer agreement is therefore correctly rejected.

*3.1.2 Connection to the location of the undertaking*

While the conflict of laws connection to the transfer agreement is generally rejected throughout legal literature, it is frequently argued that the transfer of undertaking and its effects should be subject to the laws in force in country of the seat of the undertaking (to be) transferred.[723] In effect there exist two main views on the most appropriate conflict of laws connection of a transfer of undertaking and its employment effects.[724] Connection is either sought to the employment contract or the location of the undertaking to be transferred, also known as the *lex loci* approach. Since the undertaking to be transferred is pivotal to the Acquired Rights Directive, the seat of this undertaking may well embody the most natural connecting factor.[725] After all, Article 1(2) of the directive attributes special meaning to the seat of the undertaking by causing the directive to apply 'where and in so far as the undertaking, business or part of the undertaking or business to be transferred *is situated*

[721] Niksova 2014, p. 71; Kania 2012, p. 83; Däubler 1994, p. 124.
[722] Kania 2012, p.83; Däubler 1994, p. 124.
[723] Bittner 2000, p. 464 *et seq.*; Junker 1992, p. 234 *et seq*.; Junker 1994, p. 40; Birk 1982, p. 396; Reichold 2008, p. 697 *et seq*; Birk 1978, p. 291; Henckel 2012, p, 389; Haanappel-van der Burg 2015, p. 293; Haanappel-van der Burg 2016 I, p. 8; *Cf.* Laagland 2011, p. 17; Junker 2012, p. 13.
[724] *Cf.* Bittner 2000, p. 460.
[725] *Cf.* Henckel 2012, p. 385.

within the territorial scope of the Treaty'.[726] The primary argument in favour of the application of the laws in force at the seat of the undertaking to be transferred therefore lies in the Acquired Rights Directive itself. Given that in Article 1(2) of the directive special meaning is attributed to the seat of the undertaking by applying the directive whenever the undertaking to be transferred *is situated* within the territorial scope of the Treaty, some Member States appear to have translated this provision into their national law to the extent that their national legislation applies where and so far as the undertaking to be transferred is situated within their distinct territory. The United Kingdom, Malta and Luxembourg all appear to have classified a transfer of undertaking as separate conflict of laws category, accompanied by a unilateral conflict or reference rule: whenever the undertaking to be transferred is situated within one of these Member State its national acquired rights provisions require unilateral application.[727] Although the directive itself does not hold an explicit predisposition for any particular conflict of laws connection, it does require application whenever the undertaking to be transferred is *situated* in a Member State, aiding the idea that the situation or location of the undertaking to be transferred holds considerable meaning for the conflict of laws.

Indeed, the Acquired Rights Directive revolves around the undertaking to be transferred and the effects of this transfer upon the affected employees. More so, the effects of a transfer of undertaking are not confined to the individual employment relationship, but also concern operational, economic and

[726] Emphasis added KCH.

[727] Art. L. 127-1 (2) Code du Travail Luxembourg : '*Le présent chapitre s'applique chaque fois que l'entreprise, l'établissement ou la partie d'entreprise ou d'établissement à transférer se situe sur le territoire national du Grand-Duché de Luxembourg.'*; Art. 3(1)(d) Transfer of Business (Protection of Employment) Regulations, *S.L.* 452.85: 'Article 38 of the Act and these regulations shall apply: where and in so far as the undertaking, business or part of the undertaking or business to be transferred is situated in Malta.'; Art. 3(4)(c) the Transfer of Undertakings (Protection of Employment) Regulations 2006, *S.I.* 2006 no. 246 (as amended by The Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014, *S.I.* 2014 No. 16): 'Subject to paragraph (1), these Regulations apply to: a transfer of an undertaking, business or part of an undertaking or business (which may also be a service provision change) where persons employed in the undertaking, business or part transferred ordinarily work outside the United Kingdom.'

collective employment interests.[728] Keeping these additional effects in mind, it may be false to subject all of these rights and interests, such as employee participation rights and the right to observance of terms and conditions agreed in collective agreements, to the law governing the individual employment contract. In this sense, the proponents of seeking connection to the location of the undertaking to be transferred consider the continuity of the employee representative body or the continuance of terms and conditions agreed in collective agreements of similar importance as the transfer of the existing employment contract to the transferee.[729] This argument is often countered by the statement that the primary purpose of the continuation of the employment relationships upon a transfer of undertaking is rooted in the protection of the individual employee, causing the continuation of the employment representative body and the observance of collective agreements to be merely of secondary importance. In this context, it should be noted that oftentimes there is no strict dichotomy in result between the law that applies to the individual employment contract and the law in force at the seat of the undertaking to be transferred as the place of habitual employment, the primary factor in determining the law that applies to the employment contract, will frequently coincide with the place in which the undertaking to be transferred is situated. Still, compared to the law applicable to the employment contract, which may require a lengthy assessment seeking the habitual place of employment or failing that the location of the business through which the employee was engaged,[730] the geographic centre of the undertaking is easily determined. In addition, a main advantage of the conflict of laws connection to the seat of the undertaking to be transferred, especially when compared to the connection to the individual employment contract, is that all those employed in the

[728] Bittner 2000, p. 464; Birk 1982, p. 396; Haanappel-van der Burg 2015, p. 290.

[729] Junker 1992, p. 235; Niksova 2014, p. 72.

[730] *Cf.* Article 8 Rome I Regulation. Such a lengthy assessment will mostly take place where it concerns undertaking with a high level of mobility or an undertaking that is already geared towards several countries including the one in which it is situated. These type of undertakings may embody a larger number of cross-border transfers when compared to undertakings that that are solely conducting their business within one single country. Still, in most cases the employees of the undertaking to be transferred will habitually carry out their employment at the location of the undertaking to be transferred, allowing no difference between the application of the law that applies to the individual contract of employment and the laws in force at the seat of the undertaking to be transferred.

undertaking to be transferred, i.e. the entire workforce, will be subject to the same transfer provisions upon the transfer of undertaking. By contrast, in deploying the law that applies to the individual employment contract a fragmentation may occur due to the possible existence of e.g. varying employment contracts and choice of law clauses contained therein. Consequently, the connection to the individual employment contract and the fragmentation of the law applicable among the workforce may result in only part of the workforce transferring to the transferee. Such disparity does not occur when seeking connection to the seat of the undertaking to be transferred.[731] In essence the connection to the seat of the undertaking does away with the practical objections to applying different laws to the employment effects of a transfer of undertaking upon the employees affected by the transfer by reason of the variances existing in individual employment contracts. However, the notion that the law of the seat of the undertaking to be transferred, as opposed to the law applicable to the individual employment contract, ensures that the transfer of all workers employed in the undertaking is subject to the same law is somewhat undercut by the preferential law approach enshrined in Article 6(1) Rome Convention and Article 8(1) Rome I Regulation. Where a choice of law in the employment contract derogates from the mandatory provisions of the law that would otherwise be applicable, these mandatory rules will apply in order to ensure a minimum level of employee protection. In essence, the preferential law approach ensures that the rule that is most favourable to the employee prevails. When seeking connection to the law that applies to the individual employment contract upon a transfer of undertaking the transfer of the entire workforce is therefore subject to the same law, except when e.g. a choice of law in an individual employment contract offers the individual employee more protection than the law that would otherwise be applicable to his employment contract or when the objectively applicable law does not equate the habitual place of employment of the main body of workers. Consequently, determining the law that applies to the individual employment contract may prove a particularly burdensome task, both due to the determination of the habitual place of employment and to the preferential

[731] Niksova 2014, p. 72; Bittner 2000, p. 464.

law approach enshrined in Article 8(1) Rome I Regulation, which may[732] require an extensive subjective comparison between the law chosen and the law objectively applicable.[733] By contrast, as mentioned above, the location of the undertaking to be transferred is easily determined. In addition, applying the location of the undertaking to be transferred as a connecting factor results in a more neutral and closer connection to the transfer of undertaking itself. It is the transfer of the undertaking itself that forms the nexus of a transfer of undertaking, thus justifying the conflict of laws connection to the geographic location of the undertaking to be transferred.[734] More so, from a Savignian perspective, a conflict of laws category requires a connecting factor epitomized by abstraction and neutrality that is absent of any considerations based in substantive law. The notion that the primary purpose of a transfer of undertaking is the protection of the individual employee requiring a conflict of laws connection to the law that governs the individual contract of employment determined by a choice of law, the habitual place of employment, the location of the engaging place of business or a closer connection, falsely inserts the purpose of substantive law into the conflict of laws reasoning.[735] More so, as stated above, there are some reservations to this purported purpose of a transfer of undertaking: a transfer of undertaking does not solely serve to the benefit of the individual employee as it effectuates the transfer of both individual and collective rights. The continuation of collective and company agreements and the preservation of status and function of employee representatives may be of equal value. In addition, the legitimate expectations of the employees in the continuation of their employment also extends to an interest in the continuation of collective agreements and employee representative functions.[736]

[732] Whether this is in fact the case depends on the interpretation of Article 8(1) Rome I Regulation. There exist various views and ideas in this regard, *Cf.* Zilinsky 2009.
[733] See *e.g.* Wurmnest 2012, p. 119; Zilinsky 2009, p. 1033; Even & van Kampen 2004, p. 31; Grušic 2015, p. 144, p. 150 *et seq.*; Franzen 2010, p. 234; Strikwerda 1993, p. 257.
[734] Niksova 2014, p. 72; Junker 1992, p. 235.
[735] Bittner 2000, p. 465; For some objections to this notion see paragraph 4.1.3.
[736] Niksova 2014, p. 72; Junker 1992, p. 235.

*3.1.3 Connection to the individual employment contract*

In addition to the connection to the transfer agreement and the connection to the seat of the undertaking to be transferred the applicable law to (the effects of) a cross-border transfer of undertaking be sought through connection to the individual employment contract.[737] According to this view, which constitutes the prevailing opinion, [738] for reasons of employee protection, in line with the employee-protective nature of the Acquired Rights Directive, the transfer of undertaking should be subject to the law that governs the individual contract of employment.[739] The justification of this approach lies first in the conflict of laws assessment of contract acquisition or the assignment of debts, according to which the transfer of a contract is governed by the law that governs the contract itself. This law is also believed to apply to contract transfers that occur by operation of law, such as the *ex lege* transfer of insurance, rental, consumer and employment agreements.[740] As such, the conflict of laws assessment that applies to contract acquisitions could also be extended to transfers of undertakings: since the transfer of undertaking effectuates the *ex lege* transfer of the rights and obligations stemming from the existing employment contract or relationship, the transfer of the employment contract or relationship to the transferee should be governed by the law that governs the employment contract or employment relationship.[741] A second justification for the conflict of laws connection to the individual employment contract is to be found in the aims and purpose of the Acquired Rights Directive. Since the primary aim of the Acquired Rights Directive and its national counterparts is to protect employees by securing the preservation of their employment upon a transfer of undertaking, the

[737] *Cf.* BAG 26 May 2011 – 8 AZR 18/10; BAG 29 October 1992 – 2 AZR 267/92; LAG Baden-Württemberg 17 September 2009 – 11 Sa 40/09; LAG Baden-Württemberg 15 December 2009 – 22 Sa 45/09; ArbG Freiburg 13 March 2009 – 14 Ca 516/08; LAG Hamburg 22 May 2003 – 8 Sa 29/03; Ktr. Eindhoven (vrz.) 9 September 2008, *JAR* 2008/271.

[738] BAG 26 May 2011 – 8 AZR 18/10; BAG 29 October 1992 – 2 AZR 267/92; LAG Baden-Württemberg 17 September 2009 – 11 Sa 40/09; LAG Baden-Württemberg 15 December 2009 – 22 Sa 45/09; ArbG Freiburg 13 March 2009 – 14 Ca 516/08; LAG Hamburg 22 May 2003 – 8 Sa 29/03; Ktr. Eindhoven (vrz.) 9 September 2008, *JAR* 2008/271; CMS report 2006; Leuchten 2012, p. 413; *Cf.* Ebert 2008, p. 146.

[739] Junker 2012, p. 13.

[740] Zweigert 1958, p. 657.

[741] Franzen 1994, p. 75; Zweigert 1958, p. 657.

transfer itself is intrinsically connected to the employment contract or relationship that exists with the transferor. It is this close connection to the employment relationship that may justify the conflict of laws connection to the law applicable to the employment contract. The principal purpose of the Acquired Rights Directive is to secure a continuance of the rights and obligations stemming from an employment contract or relationship. It is this reasoning that is invoked against the argument that the Acquired Rights Directive does not merely provide for individual rights and obligations but also contains labour market and social implications by having an effect on employee participation and the terms and conditions agreed in collective agreements. For reasons of employee protection it is thus considered that the law governing the individual employment contract is best suited to determine whether a transfer of undertaking has taken place.[742] Once a transfer has been established this law should also govern and determine the effects of the transfer. Yet, as mentioned above, one may ask whether, under the Savignian conflicts approach, any value should be attributed to the substantive purpose of the acquired rights provisions.[743] After all, the traditional conflict of laws approach is characterized by abstraction and neutrality and is absent of any considerations of substantive law including the aim and purpose of such law. In this sense, raising the primary aim of a transfer of undertaking, which is the protection of employees, as an argument for the conflict of laws connection to the individual contract of employment conflicts with the abstract and neutral nature of the traditional conflict of laws method. However, this method has been subject to change and adaptation over time. In fact, from a methodological point of view modern private international law is characterized by eclecticism. In certain areas of law, such as that of international employment, the conflict of laws reference is to some extent motivated by a quest for substantive justice. The argument that substantive law considerations cannot play a part in the determination of the proper conflict of laws path for transfers of undertakings therefore loses some, if not all, of its validity.

In addition to the underlying purpose of employment protection, the conflict of laws connection of the issue of transfers of undertakings to the

[742] Junker 2012, p. 13; Mankowski 1994, p. 97; Däubler 1994, p. 124.
[743] Bittner 2000, p. 465.

employment contract is based on the interests in and trust of the affected employees in the continuance of their employment. The employment contract provides the employees with a certain legal position, which includes the right to transfer to the transferee.[744] Their interests in maintaining this status is considered to take precedence over the need to protect the transferee against unforeseen obligations, especially since the transfer of the business is entirely beyond the employee's control.[745] The connectedness with the employment contract or relationship is further illustrated by the fact that issues concerning transfers of undertakings often arise in procedures for dismissal which under the conflict of laws undoubtedly belong to the purview of the conflict rule for employment contracts.[746] In those cases, the question whether or not a transfer has taken place, causing the employee to become employed by the transferee as the new employer, forms the very essence of proceedings.

*3.2 Division according to the rights in dispute*

In addition to the existence of a separate conflict of laws category for the transfer of undertaking or the transfer of undertaking being assimilated as a whole under an existing conflict of laws category, i.e. that of the individual contract of employment, there exists the view that the conflict of laws connection of a transfer of undertaking may be divided depending on the rights in dispute. In this sense, the rights and obligations stemming from a transfer of undertaking are not considered to, as a whole, befall one single reference category or reference rule. Instead, these rights and obligations are divided under the conflict of laws, leaving the possibility that different rights and obligations arising from or in connection to a transfer of undertaking are subject to the laws of different countries. Under this view, some rights and obligations, such as those concerning the transfer of the employment relationship and protection against dismissal, befall the conflict of laws reference for individual contracts of employment, whereas other rights and obligations, such as those stemming from collective bargaining agreements, are subject to a different conflict of laws provision. Under this view, most

[744] Zweigert 1958, p. 656-657; *Cf.* Junker 1992, p. 234; Gaul & Mückl 2011, p. 2319-2320.
[745] BAG 29 October 1992 – 2 AZR 267/92; Henckel 2012 ; Kania 2014, p. 83-84.
[746] It is undisputed that issues regarding dismissals are (generally) governed by the law applicable to the employment contract.

rights and obligations stemming from a transfer of undertaking will be captured by European private international law instruments.[747] Some rights and obligations however, such as those relating to employee representation, will be left to domestic (mostly uncodified) sources of private international law.[748] Determining the law that applies to a transfer of undertaking by dividing the rights and obligations to which a transfer gives rise will likely result different laws governing different parts of the transfer, making it difficult for the parties involved, i.e. transferee, transferor and the affected employees, to determine their legal position. A transfer of undertaking is no longer treated as a single concept of law, but divided into several components, possibly resulting in an impenetrable forest or labyrinth of different legal rules and laws. I therefore feel that this view should be rejected. Not only does a division, under the conflict of laws, of rights and obligations stemming from a transfer of undertaking significantly thwart legal certainty. it also results in the loss of the interaction and interdependency that exists between the acquired rights provisions of single legal system.

*3.3 Concluding remarks*

The above shows that there are several views and ideas on the proper conflict of laws path for transfers of undertakings, none of which are universally accepted. Whereas some of these views hold obvious merits, others are easily rejected. As is clear from the preceding paragraphs one of these views, i.e. the connection to the transfer agreement, clearly conflicts with the aim and purpose of the Acquired Rights Directive, whereas another, i.e. the division according to the rights in dispute, appears to frustrate legal certainty. Both these views should be discounted in the search for the most befitting conflict of laws solution in cases of transfers of undertakings. In essence there exist two main views on the preferred conflict of laws connection for transfers of undertakings.[749] These main views concern the connection to the individual employment contract and the connection to the location of the undertaking to be transferred. In deciding between these to views, it should be borne in mind that in the prevailing opinion a transfer of

[747] The Rome I Regulation and Rome Convention.
[748] *Cf.* Laagland 2011, p. 26-27.
[749] *Cf.* Bittner 2000, p. 460.

undertaking and the rights and obligations stemming therefrom are to be governed by the law that governs the individual contract of employment. The justification for this connection is primarily found in the employee-protective nature of the Acquired Rights Directive and its national counterparts.[750] Since the principal purpose of the Acquired Rights Directive is to secure a continuance of the rights and obligations stemming from an employment contract or relationship, this purpose is considered to justify the conflict of laws connection to the individual employment contract. Forestalling the findings of paragraph 8 of this Chapter, which holds a detailed portrayal of what I believe to be the proper conflict of laws path for transfers of undertakings, I can reveal that to my mind a connection to the location of the undertaking to be transferred is better suited to deal with issues of conflicting laws in situations involving a transfer of undertaking. Even though primarily intended to protect the individual employee, the effects of a transfer of undertaking are not confined to the individual employment relationship, but also concern operational, economic and collective employment interests, for which the individual employment contract holds an ill-suited connection. Since the undertaking forms the pivot of the Acquired Rights Directive a more suitable connecting factor is to be found in the seat of the undertaking to be transferred. It is the directive that revolves around this undertaking with its provisions only becoming operative if the transfer of an undertaking is to take effect. More so, a connection to the location of the undertaking to be transferred is supported by Article 1(2) of the directive, which attributes special meaning to the seat of the undertaking by causing the directive to apply 'where and in so far as the undertaking, business or part of the undertaking or business to be transferred *is situated* within the territorial scope of the Treaty'.[751] Contrary to a connection to the individual employment contract, the seat of the undertaking is easily determined and entails a neutral connection that is closely connected to the transfer of undertaking itself. However, since my view conflicts with the prevailing opinion it will not be discussed in detail until paragraph 8 of the present Chapter. Building on the notion that the connection to the individual employment contract holds the predominant

[750] Junker 2012, p. 13.
[751] Emphasis added KCH.

opinion,[752] the following paragraphs will discuss this conflict of laws connection, its accompanying conflict of laws rules and their merits and demerits.

**4. Rome I Regulation**

This paragraph seeks to discuss the application of the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations. It is due to the prevailing opinion, that seeks connection to the individual contract of employment in determining the law that governs a transfer of undertaking that this paragraph seeks to discuss the Rome I Regulation. In doing so, this paragraph considers the scope of the regulation and the consequences of seeking connection to the individual contract of employment.

Even though a transfer of undertaking in itself does not constitute a contractual obligation as it occurs *ope legis,* the rights and obligations that are secured by the transfer are mostly based in agreement.[753] In addition, were it not for the agreement between the transferor and the transferee a transfer of undertaking would not occur. It is therefore assumed that a transfer of undertaking, either as a whole or in part befalls the Rome I Regulation. Although I strongly feel that a transfer of undertaking constitutes or should constitute a separate category under the conflict of laws for which the *locus laboris* holds an ill-suited connecting factor, it is generally believed that the law that governs a transfer of undertaking equates the law that applies to the individual contract of employment. As such, according to the prevailing opinion the transfer of undertaking, from a conflict of laws perspective, is assimilated under the conflict of laws category that exists for the individual contract of employment. This assimilation finds its basis in the accessory relationship that exists with the employment contract. After all, the employment contract generally constitutes a relationship that exists between similar parties as the transfer of undertaking: being the transferor/transferee (employer) and the employee. In applying the Rome I

[752] Save for the laws of the United Kingdom, Luxembourg and Malta, which do seek connection to the location of the undertaking to be transferred, provided that the undertaking is located within their distinct territory.

[753] Most rights and obligations that are secured by the Acquired Rights Directive find their basis in the individual contract of employment.

Regulation, a transfer of undertaking may either be assimilated as a whole under the employment contract or the rights and obligations arising from a transfer of undertaking may be divided depending on the issues in dispute. In the latter situation the rights and obligations are divided under the existing Articles of the Rome I Regulation. For example, a dispute concerning an unfair dismissal (for reasons of the transfer) will be governed by Article 8 on individual contracts of employment, whereas a dispute concerning the continuance of rights and obligations stemming from collective agreements may be governed by Article 3 or 4 Rome I Regulation. Other issues, such as those involving employee participation may be entirely beyond the scope of the Rome I Regulation.

*4.1. Scope*

By reason of Article 1 the Rome I Regulation[754] applies 'in situations involving a conflict of laws, to contractual obligations in civil and commercial matters'. The regulation applies to contracts concluded as from 17 December 2009; contracts concluded prior to that date are generally governed either by the Rome Convention or the domestic law of the Member States.[755] Since the Rome I Regulation does not apply to obligations that are not based in contract, it is important to assess whether a transfer of undertaking amounts to a contractual obligation. This question of whether a cross-border transfer of undertaking falls within the ambit of the Rome I Regulation is one that is commonly surpassed in discussing the issue of cross-border transfers of undertakings. It needs to be examined whether the intrinsic connection between a transfer of undertaking and the transfer agreement or the employment contract could secure a contractual nature for the employment law concept. In deciding whether a cross-border transfer of undertaking is caught by the Rome I Regulation the scope of the regulation should not be confused with the preferred connection under the conflict of laws. Surely, before even touching upon the conflict of laws connection it must be established whether a particular case falls within the ambit of the regulation.

[754] The Rome I Regulation applies in all European Member States with the exception of Denmark.

[755] Since the formal scope of the Regulation is universal in the sense that by reason of Article 2 any law specified by the Regulation shall be applied regardless of whether or not it is the law of a Member State there is no situation in which this scope is not fulfilled.

As is clear from Article 3(1) of the Acquired Rights Directive, 'the transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer shall, by reason of such transfer, be transferred to the transferee.' This transfer of the rights and obligations stemming from the existing employment contracts or relationships to the transferee occurs automatically, i.e. by operation of law, due to the transfer of the undertaking or business to another employer. This automatic nature equally applies to other effects of the transfer such as the protection against dismissal, the transfer of rights and obligations agreed in collective agreements and the preservation of status and function of employee representatives.[756] The directive elucidates that a transfer of undertaking is the result of an agreement by the transferor and the transferee. According to Article 1(1)(a) of the Acquired Rights Directive the directive applies to 'to any transfer of an undertaking, business, or part of an undertaking or business to another employer as a result of a legal transfer or merger.' In some language versions of this particular paragraph even clarify that the transfer of undertaking, although effectuated by law, finds its basis in contract.[757] For example, according to the Dutch language version, the directive applies to any transfer of an undertaking, business, or part of an undertaking or business to another employer as a result of an 'overdracht krachtens *overeenkomst* of een fusie'. As a result, a transfer of undertaking is based in the agreement by the transferor and transferee. However, the very fact that a transfer of undertaking occurs *ope legis* makes that a (cross-border) transfer of undertaking and the obligations stemming therefrom are outwith the scope of the Rome I Regulation. Indeed, it is the legal transfer or merger that effectuates the *ex lege* transfer of the (rights and obligations stemming from the) existing employment contracts to the transferee. The obligations of the transferor and transferee that arise upon a transfer of undertaking are not primarily contractual in nature and are not subject to

[756] In addition, the transfer occurs irrespective of the will and consent of the transferee, transferor or the affected employees The employees however, do have a right to object to the transfer of rights and obligations stemming from their employment relationship. The effects of this objection is left to the national laws of the Member States.

[757] NL: 'overdracht krachtens *overeenkomst* of een fusie'; DE: '*vertragliche* Übertragung oder durch Verschmelzung'; ES: , una cesión *contractual* o de una fusión'; HR: 'posljedica *ugovornog* prijenosa, pripajanja ili spajanja poduzeća'; IT: 'a cessione *contrattuale* o a fusion'.

party autonomy. In fact, these obligations arise by operation of law regardless of the will of the affected parties. Thus, it is my firm belief that, although closely related to the transfer agreement and the employment contract (both of which are subject to the Rome Regulation) the rights and obligations stemming from a transfer of undertaking fall outside the substantive scope of the Rome I Regulation as they themselves are not contractual in nature.[758] For example, the transferee enters into the existing employment relationships automatically by reason of the transfer. This transfer does not depend upon the transfer agreement or upon the employment contract existing between the transferor and the affected employees. The obligation of the transferor to take over the existing workforce is not based in contract, but exists *ope legis.* Another example may include a transferee's failure to preserve the status and function of employee representatives. The transferee's obligation to, subject to some conditions, preserve the status and function of employee representatives stems from law by reason of the transfer and does not constitute a contractual obligation; neither the employment contract nor the transfer agreement requires such a continuance of status and function. To summarize, (the rights and obligations stemming from) transfers of undertakings are outside the substantive scope of the Rome I Regulation. The fact that, as a result of the transfer, the transferee has entered into a contractual relationship with the affected employees does not alter the characterization of a transfer of undertaking (and the rights and obligations stemming therefrom) as non-contractual. The substantive scope of the regulation is not dependent on the relationship existing between the parties in dispute, but upon 'situations involving a conflict of laws, to contractual obligations in civil and commercial matters'.

As stated above, the notion that a transfer of undertaking and the rights and obligations stemming therefrom are outwith the substantive scope of the Rome I Regulation, is not one that is universally shared. Most authors falsely assume that due to the connectedness with the individual employment

[758] This also applies to the Rome Convention; Surely, as a result of the transfer the transferee enters into the existing employment relationship, any disputes arising directly from that relationship (and not from the transfer) will generally fall within the scope of the Rome I Regulation.

contract a transfer of undertaking is covered by the Rome I Regulation. The provisions of the regulation therefore still holds some value in relation to a transfer of undertaking. In addition, in seeking connection to either the transfer agreement or the individual contract of employment under the conflict of laws the provisions of the regulation may, by analogy, be applied to the issue of transfers of undertakings. In the latter case the analogical application of the provisions of the regulation results in the substantive scope being surpassed. Here, the regulation does not apply on its own merit, but its provisions are applied by reason of comparison.[759]

In relation to the conflict of laws views and theories discussed above, the Rome I Regulation may apply in determining the law applicable to the transfer agreement (on the basis of Articles 3 and 4 Rome I Regulation) and to the individual contract of employment (per Article 8 Rome I Regulation). As such, in seeking connection to the transfer agreement or the individual contract of employment, both views which I believe to be incorrect, the applicable law to a transfer of undertaking is determined via the Rome I Regulation. My preferred option of deploying a connection to the seat of the undertaking, however, is not open under the Rome I Regulation. This option either requires the transfer of undertaking to be counted as a separate conflict of laws category for which a special provision is yet to be devised or it requires an extensive interpretation of the scope rule contained in Article 1(2) of the Acquired Rights Directive, classifying this rule as either a unilateral or a multilateral conflict of laws rule.

*4.2 Art. 3 and 4 Rome I Regulation – general rules*

Party autonomy lies at the heart of European private international law in matters relating to contract. This is clear from Article 3 of the Rome I Regulation, which, echoing the wording of the Rome Convention, codifies the principle of party autonomy by expressly allowing the parties to choose the law governing their contract. In doing so, the law designated by the Rome I Regulation primarily finds its basis in a subjective choice of law rather than an objective approach seeking the closest connection to a

[759] Generally on the basis of (uncodified) national sources of private international law.

particular country.[760] As such, the contractual parties may freely agree, either expressly or tacitly, on the law that governs their contract as a whole or in part.[761] This freedom of choice continues to exist for the duration of the contract, allowing the parties to agree on a change in applicable law at any time.[762] By reason of Article 3(3) and 3(4)[763] the choice of law may however be limited if utilized in order to circumvent mandatory provisions of Member States or Community law.[764] In the absence of a choice of law, the applicable law is generally determined on the basis of Article 4 Rome I Regulation, which in paragraph 1 holds specific connecting factors for specific types of contracts. In the absence of the contract in dispute being classified as any of these specific types of contracts or where the contract befalls several of the categories listed in paragraph 1, the applicable law to the contract is determined by connection to the habitual residence of the person effectuating the characteristic performance by reason of Article 4(2). In determining the applicable law to e.g. the transfer agreement, the transfer of the undertaking forms the characteristic performance, resulting in the applicable law being dependent on the habitual residence[765] of the transferor. Paragraph 3 holds an escape clause which is to apply whenever the contract

[760] This notion however, is somewhat tempered by the existence of preferential law approach that allows for the protection of several weaker parties such as consumers, insurees (i.e. insurance policy holders) and employees. With respect to these weaker parties the Rome I Regulation limits the choice of law to be made by the parties to a contract.

[761] As per Article 3(1) second sentence 'the choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case.'; For a contract of employment this means that the applicable law may be derived from e.g. references to national law in the employment contract or from the application of national collective bargaining agreements; *Cf.* D. Martiny, Munchener Kommentar zum BGB 6. Auflage 2015, Art. 8 Rom I-Vo, para. 20. Article 3(1) third sentence expressly allows for depecage: by their choice the parties can select the law applicable tot he whole or to only part of the contract.

[762] Article 3(2) Rome I Regulation.

[763] Article 3(4) Rome I Regulation holds a new provision in comparison to the Rome Convention. The paragraph reads: 'where all other elements relevant to the situation at the time of the choice are located in one or more Member States, the parties' choice of applicable law other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement.'

[764] *Cf.* Schönbohm, Beck'scher Online-Kommentar Arbeitsrecht, VO (EG) 593/2008, Art. 3, Rn. 36.

[765] Article 19 Rome I Regulation determines the habitual residence of companies and natural persons acting in the course of business.

is manifestly more closely connected with another country than that indicated by paragraphs 1 and 2. In addition, Article 4(4) holds a fallback rule that applies when the applicable law cannot be determined on the basis of paragraphs 1 and 2. On the basis of this rule the applicable law will then be determined by the principle of the closest connection. Pursuant to paragraph 4 the contract shall be governed by the law of the country with which it is most closely connected whenever paragraph 1 and 2 cannot be applied, for instance in establishing the applicable law to a joint venture agreement.[766]

*4.3 Art. 8 Rome I Regulation – individual employment contract*

Article 8 of the Rome I Regulation holds a special conflict of laws category for individual employment contracts, which holds:

> '1. An individual employment contract shall be governed by the law chosen by the parties in accordance with Article 3. Such a choice of law may not, however, have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable pursuant to paragraphs 2, 3 and 4 of this Article.
> 2. To the extent that the law applicable to the individual employment contract has not been chosen by the parties, the contract shall be governed by the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract. The country where the work is habitually carried out shall not be deemed to have changed if he is temporarily employed in another country.
> 3. Where the law applicable cannot be determined pursuant to paragraph 2, the contract shall be governed by the law of the country where the place of business through which the employee was engaged is situated.
> 4. Where it appears from the circumstances as a whole that the contract is more closely connected with a country other than that indicated in paragraphs 2 or 3, the law of that other country shall apply.'

[766] F. Ferrari, VO (EG) 593/2008 Art. 4 Mangels Rechtswahl anzuwendendes Recht, para. 80 in: Ferrari, Kieninger & Mankowski *et al.* 2012; Magnus 2010, p. 38.

The provision of Article 8 operates as a *lex specialis* in relation to the general rules set out in Articles 3 and 4 of the regulation.[767] The provision applies to all individual contracts of employment and does not set forth any definition of the notion of employment contract or any additional requirements akin to the provisions existing for consumers in Art. 6 Rome I Regulation. Nonetheless, the application of the provision is limited to individual contracts of employment and does not extend to collective employment contracts or collective bargaining agreements, which are generally bound by the principles of territoriality. The provision itself prescribes the procedure for establishing the applicable law to an employment contract. This procedure may prove rather intricate and has, in part, been described as 'labyrinthine' as it,[768] in situations where the parties themselves have decided upon an applicable law, requires a court to first establish the law that would govern the contract in the absence of a choice of law, second, to establish whether and which mandatory rules for employment protection exist and to end, apply the rules that favour the employee over the rules chosen by the parties.[769] In establishing the applicable law in the absence of choice the court must determine the applicable law by seeking connection to the place of habitual place of employment.[770] If this place cannot be determined the location of the place of business through which the employee was engaged forms the objective connecting factor in establishing the applicable law.[771] However the escape clause of Article 8(4) provides that if there exists a closer connection to a

[767] *Cf.* Opinion Advocate General Trstenjak *Heiko Koelzsch v Luxembourg* Case C-29/10 [2011] ECR I-1595, ECLI:EU:C:2010:789, para. 48, held under the Rome Convention.

[768] Wojewoda 2000, p. 201. The labyrinth being the procedure for establishing the applicable law in the absence of choice: the law that applies to the individual contract of employment is the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract, even if temporarily employed in another country; if the employee does not habitually carry out his work in one country, the contract is to be governed by the law of the country where the engaging place of business is situated provided that it does not appear from the circumstances that the contract is more closely connected with a country other than that of the habitual place of work or the engaging place of business, in which case the law of that other country shall apply.

[769] Article 8(1) Rome I Regulation.

[770] Article 8(2) Rome I Regulation; the Regulation describes this place as the place where, or failing that, from which the employee habitually carries out his work in performance of the contract.

[771] Article 8(3) Rome I Regulation.

country other than that of the habitual place of employment or the engaging place of business, the laws of that other country shall prevail.[772]

*4.3.1 Preferential law approach*

In the interest of weaker party protection, i.e. the protection of the interests of the individual employee, Article 8 restricts the effects of a choice of law made by the parties. Since employees are considered weaker parties, they are 'protected by choice-of-law rules that are more favourable to the interests than the general rules', an objective that is emphasized in Recital 23 of the regulation. Hence, the provision of Article 8 is generally to be interpreted *favor laboratoris.* This idea of weaker party protection is relatively new to private international law, which in its traditional sense is defined by its neutrality. In classic private international law the objective is to find the appropriate legal system rather than to achieve substantive justice, no special treatment was therefore originally afforded to employees. Yet as it stands, the Rome I Regulation is equipped with a specific choice of law rule for individual contracts of employment. As a general rule, the law that governs the individual employment contract may be chosen by the parties in accordance with Article 3 Rome I Regulation. Yet, this choice of law is restricted to the benefit of the employee. The choice of law may not have the result of depriving the employee of the mandatory employment laws and provisions of the objectively applicable law. In this sense, the preferential law approach enshrined in Article 8(1) only comes into play in situations where the parties have chosen a law that differs from the law that is considered objectively applicable. In these situations, a comparison must be made between the law chosen by the parties and the law objectively applicable. A primary question in performing this comparison entails the extent to which both laws require appraisal.[773] A general all-encompassing comparison of both legal systems, dissociated from the case at hand, is considered unsuitable as it imposes a difficult and insurmountable task for the courts. It would be arbitrary and nonsensical to suggest that the law of a single state, e.g. the Netherlands, is on the whole better than the laws in

[772] Article 8(4) Rome I Regulation. This was the case in BAG 29 October 1992 – 2 AZR 267/92.

[773] Grušic 2015, p. 144, p. 150 *et seq.*

force in another, e.g. Belgium.[774] After all, single provisions within a specific legal system may prove more favourable than others and may be incompatible with another legal regime.[775] In addition, the chosen law may, on the whole prove more favourable to the employee, whereas the specific issue under consideration yields a better result under the objectively applicable law.[776] Yet, the reverse approach, allowing for an unwantedly narrow comparision of the chosen law and the objectively applicable law would open the door to 'cherry picking'. In such a situation the employee would be able to pick and choose the laws most favourable to his situation, possibly resulting in the receipt of better protection than envisioned by either law.[777] The provisions from which the employee may pick and choose are generally part of a well-balanced system of law, allowing the application of these provisions without their legal counterparts may result in the law losing its overall cohesion.[778] After all, the effect of employment provisions may differ depending on whether they are applied singular or conjunction with other provisions.[779] Thus, neither a broad nor a narrow comparison provides a satisfactory approach under Article 8(1) Rome I Regulation. The solution lies in a middle ground between the two approaches. It is generally considered that the comparison to be made under the preferential law approach should find its basis in the specific subject matter in dispute.[780] To this end, there should be a comparison of the parts of the law regulating the issue in question, e.g. a comparison of the rules on unfair dismissal. Here too, however, there may be varying views on the set of rules that require comparison. Should the comparison comprise of the area of employment law

[774] Franzen 2010, p. 234; Grušic 2015, p. 150; Strikwerda 1993, p. 257.
[775] Opinion Advocate General Trstenjak *Jan Voogsgeerd v Navimer SA* Case C-384/10 [2011] ECLI:EU:C:2011:564, para. 49.
[776] *Cf.* D. Martiny, Munchener Kommentar zum BGB, 6. Auflage 2015, Art. 8 Rom I-VO, No. 42.
[777] Krebber 2000, p. 528; Grušic 2015, p. 150.
[778] *Cf.* Grušic 2015, p. 150.
[779] Van Eeckhoutte 2006, p. 173; Opinion Advocate General Trstenjak *Jan Voogsgeerd v Navimer SA* Case C-384/10 [2011] ECLI:EU:C:2011:564, para. 49
[780] Opinion Advocate General Trstenjak *Jan Voogsgeerd v Navimer SA* Case C-384/10 [2011] ECLI:EU:C:2011:564, para. 49; Opinion Advocate General Wahl *Schlecker v Boedeker* Case C-64/12 [2013] ECLI:EU:C:2013:241, para 34; D. Martiny, Munchener Kommentar zum BGB, 6. Auflage 2015, Art. 8 Rom I-VO, no. 42; Honsch 1988, p. 116; Zilinsky 2009, p. 1033.

in its entirety, should it be limited to certain areas within the realm of employment law such as protection against dismissal or could the group of rules be even more limited e.g. to the notice period in relation to a dismissal?[781] Again, the narrower the comparison, the greater the risk of cherry picking and of a loss of the consistency of law. Yet, the broader the comparison, the more abstract and difficult the assessment of which law is considered more favourable. Once more, a middle ground, bearing in mind the specific issues raised in the case at hand, should be sought. The comparison should therefore relate to a cohesive set of rules rather than a single provision or an entire area of law.[782] In a recent judgment the highest German employment tribunal, the *Bundesarbeitsgericht* ruled on this issue. The case involved a comparison between the chosen law, i.e. the law of Algeria, and the objectively applicable German law and involved a claim for unfair dismissal. The *Bundesarbeitsgericht* ruled that:

> *'Die Frage, welche der in Betracht kommenden Rechtsordnungen für den Arbeitnehmer günstigere Regelungen enthält, ist eine Rechtsfrage, die objektiv und nach dem Maßstab des Gesetzes zu beantworten ist. Dazu ist ein Sachgruppenvergleich vorzunehmen. Zu vergleichen sind die in einem inneren, sachlichen Zusammenhang stehenden Teilkomplexe der fraglichen Rechtsordnungen. Die Günstigkeit anhand eines Vergleichs je einzelner Normen zu bestimmen, ist nicht sachgerecht. Dies könnte dazu führen, dass der Arbeitnehmer durch eine Kombination einzelner Vorschriften der jeweiligen Rechtsordnung einen Schutzstandard erlangt, der über demjenigen liegt, den die betroffenen Rechtsordnungen tatsächlich gewähren. Eine solche Besserstellung entspricht nicht dem Schutzzweck der Norm. Auch ein abstrakter „Gesamtvergleich" der Rechtsordnungen ohne Rücksicht auf die zu beurteilende Sachfrage würde dem Sinn und Zweck von Art. 30 Abs. 1 EGBGB (aF) nicht gerecht. Dieser besteht darin, dem Arbeitnehmer im Einzelfall den ihm nach dem Regelstatut zustehenden Schutz zu erhalten. Dem Arbeitnehmer wäre nicht gedient, wenn das*

[781] Krebber 1997, p. 330; Krebber 2000, p. 529; D. Martiny, Munchener Kommentar zum BGB, 6. Auflage 2015, Art. 8 Rom I-VO, no. 42.
[782] Even & van Kampen 2004, p. 33-34.

> *gewählte Recht zwar „alles in allem" das günstigere wäre, sich für den konkreten Streitgegenstand aber als unvorteilhafter erwiese.'*[783]

Consequently, the *Bundesarbeitsgericht* dismisses both the broad and the narrow approach and opts for a comparison of groups of rules arranged by subject matter. A comparison should be made between a coherent set of rules existing in the legal systems in question, in this case the totality of relevant provisions on the protection against dismissal.[784] Given the disadvantages of an approach that is either too narrow or too broad this option for the comparison of a specific coherent set of rules seems to best accommodate the preferential law approach under Article 8(1). It has the advantage of being consistent with the wording of Article 8(1), which results in the application of the mandatory provisions of the objectively applicable law whenever these provide more protection than the law chosen by the parties. The preferential law approach therefore does not result in a choice for the law that is on the whole most favourable, instead it allows for *dépeçage*: certain distinguishable parts of the employment contract may be governed by a different law. It are these distinguishable parts or specific coherent sets of rules that can be part of the preferential law comparison. It is fair to assume that, if considered mandatory,[785] (the employment effects of) a transfer of undertaking could form such a distinguishable set of rules.

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[783] BAG, 10 April 2014 - 2 AZR 741/13, *BeckRS* 2014, 71952.

[784] BAG, 10 April 2014 - 2 AZR 741/13, *BeckRS* 2014, 71952.

[785] There exist little doubt as to whether the provisions of the directive and their national counterparts may be considered mandatory. In fact, the EFTA court has even gone so far as to describe the provisions stemming from the directive as being of public policy. In the case of *Langeland v Norske Fabricom* the Court, in its advisory opinion, held that: 'the purpose of the Directive is to ensure that the rights arising from a contract of employment or employment relationship of employees affected by the transfer of an undertaking are safeguarded. Since this protection is a matter of public policy, and therefore independent of the will of the parties to the contract of employment, the rules of the Directive must be considered to be mandatory, so that it is not possible to derogate from them in a manner unfavourable to employees. It follows that employees are not entitled to waive the rights conferred on them by the Directive and that those rights cannot be restricted even with their consent.' (Case E3/95 *Torgeir Langeland v Norske Fabricom A/S* [1995-1996] *EFTA Ct. Rep.* 36, para. 42-43) In its ruling the EFTA court even went so far as to say that an employee cannot waive the rights conferred by the mandatory provisions of the Directive, such as Article 3(1), even if as whole he is not placed in a worse position.

In opposition to the generally accepted preferential law approach, there exists the idea that the mandatory provisions of the objectively applicable law apply regardless of the choice of law made by the parties.[786] In other words, according to this view, the parties may not set aside the mandatory provisions of the objectively applicable law by a mere choice of law, rendering these provisions choice-resistant. In this sense the parties are left with a merely substantive choice: they may only choose the law in those areas where the objectively applicable law is merely regulatory in nature.[787] Under application of the preferential law approach Article 8(1) is plagued by ambiguity. Not only is there no direct indication of which approach is to be used in determining the extent of comparison between the law chosen and the law objectively applicable, the application of the approach may be subjective and gives rise to uncertainty regarding the applicable law. In addition, the question arises whether Article 8(1) intends to favour or to protect the employee. The wording of Article 8(1) suggests that a choice of law to the benefit of the employee may be possible: indeed the notion that no choice of law may deprive the employee of the protection he enjoys under the objectively applicable law, implies that, by reason of a choice of law, more protection may be bestowed upon the employee. However, by limiting the choice of law to the areas where the objectively applicable law is merely regulatory in nature, the objective of protecting the employee may still be fulfilled. After all, in the latter situation the employees are always subject to the mandatory provisions of the objectively applicable law with the benefit that there is no confusion as to the applicable law. This view is therefore preferable to the preferential law approach under Article 8(1) as it provides for legal certainty and an ease of application.[788]

*4.3.2. Habitual place of employment*

In order to properly assess the law that governs the employment contract, both in the absence and in the presence of a choice of law, it must first be established which law governs the employment contract (or would have governed the employment contract) in the absence of a choice made by the parties. The objectively applicable law to the employment contract is first

[786] Strikwerda 2015, p. 182; *Cf.* Even & van Kampen 2004, p. 31-32; Zilinsky 2009, p. 1033.
[787] Strikwerda 1993, p. 252.
[788] Strikwerda 2015, p. 182.

determined by Article 8(2) of the Rome I Regulation, which calls for the application of the laws in force in the country of the habitual place of employment. In effect, the employment contract is to be governed 'by the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract'.[789] This law is deemed not to have changed if the employee is temporarily employed in another country. The wording of Article 8(2) is similar to that of Article 6 of the Rome Convention. However, in light of the case law of the European Court of Justice in relation to Article 19(2) of the Brussels I Regulation and Article 5(1) of the Brussels Convention, which utilises the same objective connecting factors as the Rome I Regulation and the Rome Convention, the Rome I Regulation in its reference includes the wording '*in which, or failing that, from which'.*[790] As such, Article 8(2) incorporates the reasoning stemming from the judgments in *Mulox v. Geels,*[791] *Rutten v. Cross Medical*[792] and *Weber v. Ogden*[793] that the habitual place of work constitutes the place where, or from which, the employee performs the essential part of his duties towards his employer, thus creating a certain synergy between the Brussels regime and the Rome I Regulation.[794] In *Koelzsch* the ECJ confirmed that the interpretation of the habitual place of employment under Article 5(1) of the Brussels Convention must be taken into account in determining the applicable law under Article 6 of the Rome Convention, the predecessor of Article 8 Rome I Regulation.[795] This reasoning is shared by AG *Trstenjak*, who in her opinion in *Koelzsch*, trusts that a literal, historical, systematic and purposive interpretation allows or promotes a parallel

[789] Article 8(2) Rome I Regulation.

[790] COM (2005) 650 final, p. 7; Niksova 2014, p. 78-79; The wording 'from which' incorporates the so-called 'base theory' in Article 8.

[791] Case C-125/92 *Mulox IBC Ltd v Hendrick Geels* [1993] ECR I-4075, ECLI:EU:C:1993:306.

[792] Case C-383/95 *Rutten v Cross Medical* [1997] ECR I-57, ECLI:EU:C:1997:7.

[793] Case C- 37/00 *Herbert Weber v Universal Ogden Services Ltd* [2002] ECR I-2013, ECLI:EU:C:2002:122.

[794] Case C-125/92 *Mulox IBC Ltd v Hendrick Geels* [1993] ECR I-4075, ECLI:EU:C:1993:306; Case C-383/95 *Rutten v Cross Medical* [1997] ECR I-57, ECLI:EU:C:1997:7; Case C- 37/00 *Herbert Weber v Universal Ogden Services Ltd* [2002] ECR I-2013, ECLI:EU:C:2002:122, para. 49 and 58.

[795] Case C-29/10 *Heiko Koelzsch v État du Groot-Hertogdom Luxemburg* [2011] ECR I-1595, ECLI:EU:C:2011:151, para. 33; *Cf.* Article 24 Rome I Regulation.

interpretation of the concepts contained in the Brussels and Rome Convention.[796] This parallel interpretation should however be approached with some caution as the objectives rules on international jurisdiction and the conflict of laws differ.[797]

In most cases determining the habitual place of work will not prove difficult as employees generally tend to carry out their employment within a single country. This is equally true for migrant workers and those employed by foreign employers. Problems in determining the habitual place of work therefore only occur in situations of transnational employment, i.e. in situations where the employee carries out his work in more than one country.[798] These situations do not include temporary employment abroad, as the regulation, in Article 8(2), clearly stipulates that the habitual place of employment does not change due to a temporary posting abroad. The provision does not however impose a time limit on such a posting. Article 8(2) does not clarify when a temporary posting abroad results in a change in the habitual place of employment. Recital 36 of the regulation sheds light on this issue by declaring that 'work carried out in another country should be regarded as temporary if the employee is expected to resume working in the country of origin after carrying out his tasks abroad.' The habitual place of employment in cases involving a posting abroad therefore depends on the *animus revertendi* of the employee and the *animus retrahendi* of the employer.[799] Without an intention and an expectancy to return to the place of original or habitual employment a posting abroad will be classified as a change in the habitual place of work and will thus involve a change in the applicable law. For those employees involved in a cross-border transfer of undertaking that is coupled with a cross-border relocation of the undertaking

[796] Opinion Advocate General Trstenjak *Heiko Koelzsch v Luxembourg* Case C-29/10 [2011] ECR I-1595, ECLI:EU:C:2010:789, para. 58-81.

[797] Van Eeckhoutte 2006, p. 170; Opinion Advocate General Trstenjak *Heiko Koelzsch v Luxembourg* Case C-29/10 [2011] ECR I-1595, ECLI:EU:C:2010:789, para. 82-83; Grušic 2015, p. 144, p. 150 *et seq.*

[798] An employee may perform is obligations towards his employer throughout several locations in one particular country. The existence of several locations of employment within a single country are however irrelevant to the determination of the applicable law under Article 8(2): what is decisive is the country in which the employment is habitually performed. *Cf.* Haanappel-van der Burg, Arbeidsovereenkomst, art. 8 Rome I, note 4 (2014).

[799] *Cf.* Niksova 2014, p. 79; Deinert 2013, p. 143; Mankowski 2006, p. 107; Peters 2009.

this means that the intention to permanently perform the work at the new location results in a change of the habitual place of employment. If the employee and transferee agree on establishing a general place of work at the new location the law that applies to the employee's employment contract is therefore likely to change. To my mind, for determining the law that applies to a transfer of undertaking however, the applicable law at the time of the transfer is decisive. No change in (applicable transfer) law can therefore occur due to a change in the habitual place of employment that occurs after the transfer has taken place. As is clear from the case law regarding Article 5(1) Brussels Convention the place where an employee 'habitually carries out his work is the place where, or from which, taking into account all the circumstances of the case, he in fact performs the essential part of his duties *vis-à-vis* his employer.' The determination of the applicable law thus requires an examination of whether the employee principally carries out his work in or from one or several countries.[800] An employee works in one single country if the effective centre of the employee's working activities is located within that country.[801] This means that the habitual place of employment equals the place where the employee performs the essential part of his duties *vis-à-vis* his employer.[802] In the absence of a centre of activities,[803] the place where the employee carries out the majority of his activities constitutes the habitual place of employment.[804] If it cannot be established in which country the employee performs the majority of his activities the fall back rule of the engaging place of business still does not come into play. Situations where the location of a majority of activities cannot be established are most likely to occur in employment relationships that are epitomized by very high degree of employee mobility, such as those existing in the transport sector or commercial representatives operating

[800] *Cf.* Case C-29/10 *Heiko Koelzsch v État du Groot-Hertogdom Luxemburg* [2011] ECR I-1595, ECLI:EU:C:2011:151.
[801] Case C-383/95 *Rutten v Cross Medical* [1997] ECR I-57, ECLI:EU:C:1997:7, para. 23.
[802] Case C-383/95 *Rutten v Cross Medical* [1997] ECR I-57, ECLI:EU:C:1997:7, para. 23; Case C-125/92 *Mulox IBC Ltd v Hendrick Geels* [1993] ECR I-4075, ECLI:EU:C:1993:306.
[803] Case C-383/95 *Rutten* v Cross Medical[1997] ECR I-57, ECLI:EU:C:1997:7, para. 23.
[804] Case C- 37/00 *Herbert Weber v Universal Ogden Services Ltd* [2002] ECR I-2013, ECLI:EU:C:2002:122, para. 42; *Cf.* Case C-29/10 *Heiko Koelzsch tv État du Groot-Hertogdom Luxemburg* [2011] ECR I-1595, ECLI:EU:C:2011:151, para. 45.

throughout several countries.[805] In *Koelzsch* the ECJ reaffirmed that even in cases involving the transport sector, *Koelzsch* worked as a lorry driver based out of Germany under a contract governed by Luxembourg law and was involved in the transport of flowers and other plants from Denmark to mostly German destinations,[806] 'the criterion of the country in which the work is habitually carried out must be given a broad interpretation and be understood as referring to the place in which or from which the employee actually carries out his working activities and, in the absence of a centre of activities, to the place where he carries out the majority of his activities.'[807] In a later case, the ECJ appears to make every effort to ensure that the engaging place of business, even as a court of last resort, is not awarded application as a connecting factor.[808] In *Voogsgeerd v Navimer* the plaintiff served as a chief engineer aboard two ships whose navigation area extended to the North Sea.[809] In earlier proceedings, *Voogsgeerd* had failed to establish that he carried out the majority of his activities in Belgian waters. The ECJ held that the court seised must take account of all the factors which characterise the activity of the employee and must, in particular, determine in which State is situated the place from which the employee carries out his tasks, receives instructions concerning his tasks and organises his work and the place where his tools are situated[810] as well as 'the place of actual employment' and the place where the employee 'must report before

[805] The cases in *Mulox (*Case C-125/92 *Mulox IBC Ltd tv Hendrick Geels* [1993] ECR I-4075, ECLI:EU:C:1993:306) and *Rutten (*Case C-383/95 *Rutten v Cross Medical* [1997] ECR I-57, ECLI:EU:C:1997:7) concerned commercial representatives. In both cases the employees worked from an office to which they frequently returned after performing their work abroad.

[806] Case C-29/10 *Heiko Koelzsch v État du Groot-Hertogdom Luxemburg* [2011] ECR I-1595, ECLI:EU:C:2011:151*,* para. 13, 14.

[807] Case C-29/10 *Heiko Koelzsch v État du Groot-Hertogdom Luxemburg* [2011] ECR I-1595, ECLI:EU:C:2011:151, para. 45.

[808] Case C-384/10 *Jan Voogsgeerd v Navimer Sa SA* [2011] ECR I-13275, ECLI:EU:C:2011:842, para. 35; Case C-29/10 *Heiko Koelzsch v État du Groot-Hertogdom Luxemburg* [2011] ECR I-1595, ECLI:EU:C:2011:151, para. 43.

[809] An area of the seas which is exclusively comprised of the EEZs of the UK, Norway, Denmark, Germany, the Netherlands, Belgium and France.

[810] Case C-384/10 *Jan Voogsgeerd v Navimer SA* [2011] ECR I-13275, ECLI:EU:C:2011:842, para. 38; Case C-29/10 *Heiko Koelzsch v État du Groot-Hertogdom Luxemburg* [2011] ECR I-1595, ECLI:EU:C:2011:151, paras. 48 and 49.

discharging his tasks'.[811] If all the factors that characterise the employment relationship are located in one country, i.e., if the majority of the obligations towards the employer are performed in the same country, the employee is considered to habitually carry out his work in or from that country.[812] As such, the ECJ in *Voogsgeerd* appears to equate the place of habitual employment, for employees working in the transport sector, to 'a fixed base from which work is organised and where the personnel perform other obligations in relation to the employer'.[813] Application of the habitual place of work as a decisive factor in determining the applicable law therefore appears to almost exclude the fall back provision of Article 8(3), which takes into consideration the secondary factor of the engaging place of business.[814] Determining the place of habitual employment in the manner suggested in *Voogsgeerd*, i.e. by taking into account all the factors that characterize the employment relationship, will, in situations involving transnational employment, likely prove a lengthy and burdensome task, requiring a pervasive factual appraisal.[815] Moreover, this approach subjects employees to considerable uncertainty with respect to the law that will govern their contract (in the absence of a choice of law). In this sense, it would have been preferable if the ECJ were to have cut the Gordian knot in favour of a more easily determined deciding connecting factor such as the place of business through which the employee was engaged, i.e. the place of business that provides work instructions to the employee. Indeed, where the habitual place of performance cannot be determined the place of the undertaking through which the employee was engaged should determine the law that governs the employment contract. Surely, it serves to the benefit of the employee if the law that has the closest legal, factual and geographic connection to the existing legal relationship governs the employment contract. In addition, the use of a single connecting factor for all employees whose habitual place of

[811] Case C-384/10 *Jan Voogsgeerd v Navimer SA* [2011] ECR I-13275, ECLI:EU:C:2011:842, para. 40. See: Rammeloo 2011, p. 407-408, who places a critical note on the cataloguing of the conflict of laws reference within (special) conflict rules.

[812] Case C-384/10 *Jan Voogsgeerd v Navimer SA* [2011] ECR I-13275, ECLI:EU:C:2011:842, para. 39, 40, 41.

[813] COM(2005) 650 final, p. 7.

[814] *Cf.* Case C-384/10 *Jan Voogsgeerd v Navimer SA* [2011] ECR I-13275, ECLI:EU:C:2011:842, para. 32.

[815] The ruling in *Voogsgeerd* is likely limited to cases involving transnational employment such as international transport.

employment, in the absence of a centre of working activities or a place where the majority of the employment tasks are carried out, cannot be readily determined would contribute to enhancing legal certainty and attaining the overall objective of employee protection.[816] Yet, the present interpretation of the concept of habitual employment leaves few situations in which the fallback rule of Article 8(3), which leads to the application of the laws in force at the location of the engaging place of business, would be applicable. Instead, in situations involving transnational employment or international transport connection is sought to the employee's lasting base. In the absence of such a base the fall back rule of Article 8(3) is to apply.

*4.3.3. Engaging place of business*

In situations where the habitual place of employment cannot be determined, Article 8(3) Rome I Regulation provides that the law governing the employment contract is the law of the 'country where the place of business through which the employee was engaged is situated.' This connecting factor only comes into play when the applicable law cannot be determined on the basis of Article 8(2).[817] As such, the engaging place of business serves as a secondary objective connecting factor that rarely requires application. Due to the broad interpretation attributed to the habitual place of work it is difficult to imagine scenarios under which the engaging place of business requires application. Such cases may be limited to situations where the employee does not carry out his employment within the territory of a single state, but performs his work on e.g. a drilling platform or on the high seas. Other situations could involve an employee that retains multiple permanent bases

[816] This view is supported by AG Trstenjak in Opinion Advocate General Trstenjak *Jan Voogsgeerd v Navimer SA* Case C-384/10 [2011] ECLI:EU:C:2011:564 , para. 68: ' After all, using the place of engagement as the connecting factor has the advantage of making the applicable law foreseeable, unlike using a purely factual criterion such as the place where the work is habitually carried out. While the latter place is liable to change frequently over the course of a person's employment, the place of engagement usually remains unchanged, notwithstanding any relocations by the undertaking itself or any long-term overseas postings of the employee. In the final analysis, the place of engagement provides the clearest indication of where the employee was first incorporated into the structure of the undertaking. In the case, as here, of employment relationships which require the employee to be highly mobile, this appears to be the criterion which best serves the continuity of the legal relationships between the contracting parties.'

[817] Deinert 2013, p. 150; Grusic 2015, p. 167.

of equal importance throughout several countries.[818] The original Commission proposal for the Rome I Regulation shows that these are the scenarios for which Article 8(3) was originally intended. The proposed Article 6(2)(b) indicated that an individual contract of employment would be governed ´if the employee does not habitually carry out his work in or from any one country, or he or she habitually carries out his work in or from a territory subject to no national sovereignty, by the law of the country in which the place of business through which he was engaged is situated.´[819] The inclusion of a specific provision for those carrying out their work outside a specific territory was met with resistance:[820] after all, even if carrying out his work outside the territory of any state an employee may still perform his duties from a fixed base that is located within a specific country, making it possible to designate a habitual place of employment. In its opinion, the European Economic and Social Committee stated:

> ´ (…) the Committee finds it difficult to understand why a provision is needed for "territory subject to no national sovereignty" (Article 6(2)(b)). Perhaps this refers to drilling platforms in international waters. This should at least be clarified in the explanatory memorandum.´[821]

In its final wording, Article 8(3) did not include any reference to those performing their employment outside the territory of any specific state. Employment contracts under which work is performed in a *locus sine lege,* in the absence of a fixed base, naturally fall within the ambit of Article 8(3). Specific mention of this particular group of employees or employment contracts within Article 8(3) therefore appears superfluous.

[818] Grusic 2015, p. 167.

[819] COM(2005) 650 final, p. 17.

[820] Basedow & Wurmnest *et al.* 2007, p. 291, 292; Opinion of the European Economic and Social Committee on the Proposal for a Regulation of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I), 2006, INT/307 Contractual obligations (Rome I).

[821] Opinion of the European Economic and Social Committee on the Proposal for a Regulation of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I), 2006, INT/307 Contractual obligations (Rome I).

An important consideration in determining the engaging place of business as a second-tier connecting factor is understanding what constitutes an ´engaging place of business´.[822] It is debatable whether the location of the business concluding the employment contract, which may at times be arbitrary, should be decisive. After all, if this were to be the deciding factor, the employer, in particular in cases involving special types of contract that are subject to the purview of Article 8(3) only, may manipulate the applicable law by choosing to conclude the contract through a subsidiary or a recruiting agency located in another country. The location of the place of business that is involved in concluding the employment contract may thus hold an inherent choice of law, circumventing the employee protection encompassed by Article 8(1). In legal literature it is therefore on occasion assumed that the engaging place of business should correspond to the centre of the employment relationship, i.e. the place whether the employee is integrated into the organization.[823] This integration may be characterized by the payment of wages, the accountancy of work, the receipt of instructions and taxation. Yet, as is clear from the judgments in *Voogsgeerd* and *Koelzsch,* if such a place of organizational integration exists, it may constitute a fixed base under Article 8(2). The factors characterizing organizational integration could potentially be divided among several locations, making it difficult to establish a single place of business in which the employee is organizationally integrated. In the interests of legal certainty the ECJ in *Voogsgeerd,* opted for the application of the place of business where the contract is concluded as a more easily determined localization of the engaging place of business. The court ruled that in the interests of foreseeability only a strict interpretation of the engaging place of business as a subsidiary connecting factor will suffice.[824] According to the court ´the use of the term 'engaged' in Article 6(2)(b) of the Rome Convention, clearly refers purely to the conclusion of the contract or, in the case of a *de facto* employment relationship, to the creation of the employment relationship and

[822] Grusic 2015, p. 167, Deinert 2013 p. 151, Mankowski 2009, p. 197.

[823] This view, which primarily exists in German legal literature is known as the *Eingliederungstheorie:* Deinert 2013, p. 151; Mankowski 2009, p. 197; Wurmnest 2009, p. 491; *Cf.* Riesenhuber 2009, p. 132; Von Hein 2011, p. 415-416.

[824] Case C-384/10 *Jan Voogsgeerd v Navimer SA* [2011] ECR I-13275, ECLI:EU:C:2011:842, para 47.

not to the way in which the employee's actual employment is carried out.′[825] In this regard, the relevant place of business is the business ′in whose name and on whose behalf the contract is concluded.′[826] The discussion as to whether the connecting factor in Article 8(3) intended to refer to the place where the employee is incorporated into the organization or to the place of business that concluded and negotiated the employment contract was thus put to an end by the ECJ's decision in *Voogsgeerd*. The court stated that all factors that characterize the employment contract and refer to the way that the employment is actually carried out can only be taken into consideration in determining the 'habitual place of work'.[827] By referring to the engaging place of business as the establishment that negotiated the employment contract no real connection to the employment relationship may exist. From an employee protective perspective, the engaging place of business may therefore not prove a suitable connecting factor.[828] Yet, the situation in which the engaging place of business as a connecting factor may be abused by the use of e.g. recruitment offices located in countries known for their low employment standards already appears remedied by the interpretation of Article 8(3) itself as it may refer to the place of business in whose name and on whose behalf the employment contract is concluded. In addition, the escape clause of Article 8(4) may override the applicable law under Article 8(3) (and 2) if a closer connection to another country exists. The relevance of the engaging place of business as a secondary connecting factor is therefore limited: on the one hand its application is limited due to the extensive application and interpretation of the habitual place of employment, on the other hand the law of the engaging place of business may be set aside if a closer connection with another country exists.

*4.3.4 Escape clause of Article 8(4)*

On the basis of Article 8(4) Rome I Regulation 'where it appears from the circumstances as a whole that the contract is more closely connected with a

[825] Case C-384/10 *Jan Voogsgeerd v Navimer SA* [2011] ECR I-13275, ECLI:EU:C:2011:842,para. 46.
[826] Grušic 2015, p. 169; Case C-384/10 *Jan Voogsgeerd v Navimer SA* [2011] ECR I-13275, ECLI:EU:C:2011:842, para. 49.
[827] Case C-384/10 *Jan Voogsgeerd v Navimer SA* [2011] ECR I-13275, ECLI:EU:C:2011:842, para. 46; *Cf.* Van Hoek 2014, p. 161; Grušic 2015, p. 169.
[828] *Cf.* Van Hoek 2015, p. 442.

country other than that indicated in paragraphs 2 or 3, the law of that other country shall apply.' In other words: if another country is more closely connected with the employment contract than the country of habitual employment and/or the country in which the engaging place of business is located, the laws of this country shall apply. Hence, the provision of Article 8(4) does not constitute a fall-back clause or a tertiary connecting factor, but acts as an escape clause that may override the law designated by the primary and secondary connecting factors of the habitual place of employment and the engaging place of business.[829] The escape clause reflects the *Savignian* notion that the legal relationship finds its home with (the law of) the country with which it is most closely connected. The aim of the provision is to achieve a conflict of laws justice, in situations where this justice is not attained by application of Articles 8(2) and 8(3). *Deinert* accurately describes the aim of the provision as the realization of private international law justice for the purposes of a fair determination of the applicable law and not the creation of substantive justice:

> *"Es geht damit um die Verwirklichung international-privatrechtlicher Gerechtigkeit im Sinne einer gerechten Bestimmung des anwendbaren Rechts, nicht aber um materiell-rechtliche Gerechtigkeit, indem etwa die Suche nach dem für den Arbeitnehmer günstigsten Recht eröffnet wird."*[830]

The purpose of Article 8(4) is therefore not to apply the law that is most beneficial to the individual employee, but to apply the law that is most closely connected to the legal relationship in dispute.

The wording of paragraph 8(4) corresponds to that of Article 6(2) of the Rome Convention, but differs from the wording of the general escape clause contained in Article 4(3) of the Rome I Regulation. Under Article 4(3) the escape clause is only applied where a *manifestly* more closely connection exists, whereas in Article 8(4) a mere closer connection will suffice. Does this difference in the phrasing of the provisions mean that the escape clause of Article 8(4) is to be applied with more leniency than that of Article 4(3),

[829] Deinert 2013, p. 154; Hönsch 1988, p. 114.
[830] Deinert 2013, p. 154-155.

which appears to only allow for application in truly exceptional circumstances?[831] Does the employee protective nature of Article 8 justify such a lenient approach? An answer to these questions may be found in the case of *Schlecker,* held under Art. 6 Rome Convention. The primary question in this case did not refer to the differences between the escape clause in Article 4(3) and that in Article 8(3).[832] Instead, the case concerned the relationship between the escape clause and the habitual place of work as a primary objective connecting factor. In *Schlecker* the Dutch *Hoge Raad* faced the question whether the escape clause can set aside the law designated by the habitual place of work even if a genuine connection, demonstrated by a lengthy period of habitual employment without interruption, to this place exists? In other words: is the application of the escape clause reserved for exceptional cases only or is the connecting factor of the habitual place of work easily displaced if a closer connection to another country exists? The case in *Schlecker* involved a German frontier worker, mrs. *Boedeker*, resident in Germany, employed by a German undertaking (with branches throughout several European Member States), but with a habitual place of employment in the Netherlands. Mrs. *Boedeker* had performed her work in the Netherlands for a period of more than ten years without interruption. The employer, *Schlecker*, had terminated the employment contract while offering mrs. *Boedeker* another job in Germany. In the dispute that followed mrs. *Boedeker* argued for the application of Dutch law on the basis of Article 6(2)(a) Rome Convention whereas *Schlecker* argued for the application of German law on the basis of the escape clause. Even though mrs. *Boedeker* had performed her employment in the Netherlands for a lengthy period without interruption, all other relevant factors were located in Germany. In his conclusion Advocate General *Strikwerda,* after stating that the connecting factor of the habitual place of employment forms the embodiment of employment protection under the conflict of laws, argues that the escape clause deserves application if all relevant factors, other than that of the habitual place of employment, point towards a single country, unless the employee permanently (or for a lengthy period of time) performs his employment in another country:

[831] Von Hein 2011, p. 418; Grušic 2015, p. 174.

[832] Under the Rome Convention, Article 4(5) did not contain the word 'manifestly', it simply reffered to a country that is 'more closely connected'.

> *'…in beginsel dient in gevallen waarin alle aanknopingspunten, behalve de plaats waar de werknemer zijn arbeid verricht, naar slechts één enkel land verwijzen, toepassing te worden gegeven aan de exceptieclausule van art. 6 lid 2, slot, EVO, tenzij de werknemer zijn arbeid langdurig of permanent in een ander land verricht. In dit laatste geval verzet het beschermingsbeginsel zich tegen toepassing van de exceptieclausule: het zou ertoe leiden dat de werknemer wordt onderworpen aan een ander beschermingsregime dan geldt in de omgeving waar hij langdurig dan wel op permanente basis ter uitvoering van zijn arbeidsovereenkomst werkzaam is.'*[833]

A lasting or permanent connection to the habitual place of employment may thus preclude the application of the escape clause. This notion finds its basis in the employee protective nature of the habitual place of employment as a primary objective connecting factor. In establishing the law that applies to the individual employment contract it is not decisive that a country other than that where the employee habitually performs his employment has a closer geographic connection to the legal relationship; what is important is whether the application of the law of this other country is detrimental to the purpose of the protection principle embodied by the habitual place of employment.[834] The *Hoge Raad* did not immediately rule on the matter, but decided to refer the case to the ECJ for a preliminary ruling. In doing so it asked whether Article 6(2) of the Rome Convention should 'be interpreted in such a way that, if an employee carries out the work in performance of the contract not only habitually but also for a lengthy period and without interruption in the same country, the law of that country should be applied in all cases, even if all other circumstances point to a close connection between the employment contract and another country?'[835] Advocate General *Wahl* concluded that in deciding upon the relationship between the two parts of

[833] Opinion Advocate-General Strikwerda: HR 3 February 2012 *JAR* 2012/69, ECLI:NL:HR:2012:BS8791, para. 26(1).

[834] Opinion Advocate-General Strikwerda: HR3 February 2012 *JAR* 2012/69, ECLI:NL:HR:2012:BS8791, para. 26(3).

[835] Case C-64/12 *Anton Schlecker, trading under the name 'Firma Anton Schlecker' v Melitta Josefa Boedeker* [2013] ECLI:EU:C:2013:551.

Article 6(2), i.e. the habitual place of employment as a primary connecting factor and the escape clause, there are two conflicting views:

> 'According to the first, the fundamental relationship between those two parts is that of the rule and the exception, which means that the search for possible closer connections with another country can occur only in exceptional circumstances, that is to say, in the event that the presumptions result in the selection of a law which is manifestly inappropriate to the contract. According to the second view, there is no hierarchical relationship between the two parts and the court has a measure of discretion in determining the law most closely connected with the relevant contract.'[836]

Opposing the view of Advocate General *Strikwerda,* who does not consider the application of the escape clause justified in situations where a genuine long-lasting connection to the habitual place of employment exists, Advocate General *Wahl* adopted the latter view by arguing that the escape clause 'does not lose its *raison d' être*' in situations where 'the employment contract has been performed in a lasting, continuous and uninterrupted manner in a single country'; 'if a contract is obviously located in a State which is not that of the habitual performance of the work, it is still possible to bring that provision into operation.'[837] Thus, in situations where the habitual place of employment does not constitute the centre of gravity of the employment relationship, its application may be omitted in favour of another country to which such a connection does exist.[838] In this sense it is irrelevant that the law of one country, the habitual place of employment, as was the case in *Schlecker,* is more beneficial to the employee than the law of another; the objective of the employee protective provision is not to favour the individual employee, but to protect the employee by application of the (mandatory rules of the) law with which the most significant connection

[836] Opinion Advocate General Wahl *Schlecker v Boedeker* Case C-64/12 [2013] ECLI:EU:C:2013:241, para. 42; *Cf.* Case C-64/12 *Anton Schlecker, trading under the name 'Firma Anton Schlecker' v Melitta Josefa Boedeker* [2013] ECLI:EU:C:2013:551, para. 54.

[837] Opinion Advocate General Wahl *Schlecker v Boedeker* Case C-64/12 [2013] ECLI:EU:C:2013:241, para. 60.

[838] Opinion Advocate General Wahl *Schlecker v Boedeker* Case C-64/12 [2013] ECLI:EU:C:2013:241, para. 61.

exists.[839] The ECJ concurred with the Advocate General and ruled that the provision of Article 6 Rome Convention should ensure application of the law with which the contract is most closely connected, even if that law is less favourable to the individual employee.[840] In situations where the application of the habitual place of employment or the engaging place of business does not result in the application of the law that is most closely connected to the legal relationship at hand, the task of securing such a significant connection falls to the escape clause. In previous cases the court had decided, that due to the employee protective nature of the habitual place of employment, this connecting factor takes precedence over that of the engaging place of business.[841] Such a hierarchy however is inexistent with respect to the escape clause, whether that of Article 6(2) Rome Convention or of Article 8(4) Rome I Regulation.[842] Thus, in essence, the application of the escape clause of Article 8(4) is not merely reserved for exceptional cases, but comes into play whenever a more significant connection to a country other than that of the habitual place of employment or the engaging place of business exists.

*4.3.5 Application to a transfer of undertaking*

If, in determining the law that applies to a cross-border transfer of undertaking, connection is sought to the individual contract of employment, Article 8 of the Rome I Regulation will apply. In one view the entire transfer of undertaking is assimilated under the conflict of laws category for individual contracts of employment, meaning that all rights and obligations

[839] Case C-64/12 *Anton Schlecker, trading under the name 'Firma Anton Schlecker' v Melitta Josefa Boedeker* [2013] ECLI:EU:C:2013:551, para. 60.

[839] Opinion Advocate General Wahl *Schlecker v Boedeker* Case C-64/12 [2013] ECLI:EU:C:2013:241, para. 26; Opinion Advocate-General Strikwerda: 3 February 2012 *JAR* 2012/69, para. 21; Grušic 2015, p. 176; Deinert 2013, p. 154-155; Case C-64/12 *Anton Schlecker, trading under the name 'Firma Anton Schlecker' v Melitta Josefa Boedeker* [2013] ECLI:EU:C:2013:551, para. 34.

[840] Case C-64/12 *Anton Schlecker, trading under the name 'Firma Anton Schlecker' v Melitta Josefa Boedeker* [2013] ECLI:EU:C:2013:551, 34.

[841] *Cf.* Case C-384/10 *Jan Voogsgeerd v Navimer SA* [2011] ECR I-13275, ECLI:EU:C:2011:842; Case C-29/10 *Heiko Koelzsch v État du Groot-Hertogdom Luxemburg* [2011] ECR I-1595, ECLI:EU:C:2011:151; Case C-64/12 *Anton Schlecker, trading under the name 'Firma Anton Schlecker' v Melitta Josefa Boedeker* [2013] ECLI:EU:C:2013:551, para. 35-36.

[842] Case C-64/12 *Anton Schlecker, trading under the name 'Firma Anton Schlecker' v Melitta Josefa Boedeker* [2013] ECLI:EU:C:2013:551, para. 38.

stemming from a transfer of undertaking will be subject to this conflict of laws category regardless whether these rights and obligations are individual or collective in nature. While on the basis of another view the applicable law is determined on the basis of the rights and obligations in dispute, which may befall Articles 3, 4 and 8 of the Rome I Regulation or may be entirely beyond its scope, to be determined by national sources of private international law. In previous paragraphs I have stated my objections to these conflict of laws connections as they do not do justice to the nature and objectives of the Acquired Rights Directive, which has both individual and collective underpinnings. The conflict of laws connection to the individual contract of employment is therefore wholly unsuited for the application to a cross-border transfer of undertaking, which although connected to the individual contract of employment is an entirely separate legal concept to be conflictually dealt with as such. More so, conflictually dividing the rights and obligations stemming from a transfer of undertaking will not only result in those rights and obligations possibly being governed by different legal systems, it will also make it more difficult to establish the applicable law and thwart the foreseeability of the applicable law. Regardless, the connection to the individual contract of employment forms the prevailing opinion, and therefore deserves discussion. In seeking connection to the individual contract of employment the applicable law is determined by a restricted choice of law, the habitual place of employment, the engaging place of business or the country to which the contract is more closely connected. As stated above, the preferential law approach enshrined in Article 8(1) of the Rome I Regulation restricts the law chosen by the parties to the extent that such a choice may not deprive the employee of the protection granted by the mandatory provisions of the place of habitual employment, the engaging place of business or the country with which the contract is more closely connected. A transfer of undertaking and the rights and obligations stemming therefrom may constitute such provisions, which means that according to the prevailing view a comparison between the mandatory transfer provisions of the objectively applicable law and that of the choice of law must be carried out in order to assess which provisions are (as a whole) more beneficial to the employee. In this sense it may be that the German provision of § 613a BGB is considered more favourable than the Dutch provisions of Art. 7:662 *et seq.* BW, since under German law the employee has the right to contradict the transfer of his employment relationship to the

transferee and remain in employment with the transferor,[843] known as a *Widerspruchsrecht*.[844] Dutch law is not equipped with a provision allowing the employee to object to the transfer of his employment relationship, whereas German law provides the employees with an option additional to the transfer of the employment relationship.[845] A similar *Widerspruchsrecht* exists in Austrian law, where, on the basis of § 3(4) AVRAG, the employee has the option to object to the transfer of his employment relationship causing him to remain in employment with the transferor. However, in comparison to the German law this right of objection is more restricted and appears less beneficial to the employee since it only allows the employee to object to the transfer in situations where the transferee does not continue the protection granted by the existing collective agreements or does not assume the existing pension entitlements.[846] A schematic representation of the above would show the German acquired rights provisions at the top as the most beneficial, followed by Austrian and subsequently Dutch law. With regard to cross-border transfers of undertakings differences in national law exist where the national laws have decided to extend the application of their acquired rights provisions beyond the minimum level of employment protection afforded by the Acquired Rights Directive: a classic example would be the application of the directive to seagoing vessels.[847] Whereas some Member

[843] It is likely that after the transfer of the undertaking the transferor will not be able to continue the employment of the employee. In those cases, under German law, the transferor can dismiss the employee (with compensation) for economic reasons.

[844] There are some conditions to the application of this right. On the basis of 613a (6) BGB the employee has the right to object to the transfer of his employment relationship within a period of one month after being informed of the transfer. In practice however, it appears that this period in which the employee is allowed to object to the transfer is often extended for as much as one year due to the transferor's or transferee's failure to properly comply with the information and consultation requirements of 613a (5) BGB.

[845] *Cf.* Franzen 1994, p. 119 *et seq.*

[846] §3(4) AVRAG reads: *‚Der Arbeitnehmer kann dem Übergang seines Arbeitsverhältnisses widersprechen, wenn der Erwerber den kollektivvertraglichen Bestandschutz (§ 4) oder die betrieblichen Pensionszusagen (§ 5) nicht übernimmt. Der Widerspruch hat innerhalb eines Monats ab Ablehnung der Übernahme oder bei Nichtäußerung des Erwerbers zum Zeitpunkt des Betriebsüberganges innerhalb eines Monats nach Ablauf einer vom Arbeitnehmer gesetzten angemessenen Frist zur Äußerung zu erfolgen. Widerspricht der Arbeitnehmer, so bleibt sein Arbeitsverhältnis zum Veräußerer unverändert aufrecht.‘*

[847] For an extensive discussion of the application of the directive to seagoing vessels see Chapter 5 and

States, such as the Netherlands[848], have upheld the exclusion of seagoing vessels others, such as Portugal and Spain, have decided to extend the application of their acquired rights provisions to the transfer of (single) seagoing vessels,[849] which may be cause for them being considered more beneficial in an overall preferential law assessment under Article 8(1) of the Rome I Regulation.[850] The fact that the acquired rights provisions are considered mandatory provisions under Article 8(1) makes them subject to the preferential law approach, causing an assessment of which transfer of undertakings provisions are more favourable to the employee. Beyond this, the provision of Article 8 does not require any special application in relation to cross-border transfers of undertakings. Surely, internationally operating undertakings, such as those in the transport sector, may be a likely subject of a cross-border transfer of undertaking, causing the problems in determining the habitual place of employment to be of relatively more frequent occurrence in cross-border transfer scenarios. The difficulties in establishing a habitual place of employment, which in most cases is easily determined, still, are not subject to change due to the dispute involving a cross-border transfer of undertaking. As such, the application of Article 8 Rome I Regulation does not require any application or yield any difficulties specific to cross-border transfers of undertakings. The application of the provision is not conditional on the employment issue in dispute.

However, a problem that is frequently and falsely signalized in relation to cross-border transfers of undertakings is that of a change in the applicable law, also known as a *conflit mobile* or *Statutenwechsel*. Since, in seeking connection to the law governing the employment contract, the applicable law is primarily determined by the habitual place of employment, this law is

[848] The Netherlands upholds the exclusion with regard to single vessels but does not prevent the transfer of seagoing vessels as part of a larger undertaking:

[849] Austria, the Czech Republic, Estonia, France, Germany, Hungary, Italy, Ireland, Lithuania, Poland, Portugal, Spain, Sweden and the UK, *cf.* COM(94) 300 final, para. 31; Commission Report on Council Directive 2001/23/EC of 12 March on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, SEC(2007) 812; COM(2007) 334 final.

[850] To this end, it is import to note that a Commission proposal for altering the exclusion of seagoing vessels in the Acquired Rights Directive is currently under consideration; See Chapter 5.

subject to change once a change in the habitual place of employment occurs. This situation is not specific to cross-border transfers of undertakings, but occurs with regard to employment contracts in general whenever the employee habitually continues his work at a new location in another country. More so, in deciding on the applicable law to a transfer of undertaking this law, to my mind, is cemented at the time of the transfer and as such not subject to change even in the event of a relocation of the undertaking. Those seeing the change in applicable law as a problem that is specific to cross-border transfers of undertakings appear to depart from the misguided belief that in determining the law that applies to the transfer the law governing the employment contract as the last habitual place of employment should be decisive, as is the common understanding of the application of the provisions designating the applicable individual employment law under Article 8 Rome I Regulation and Article 6 Rome Convention.[851] This change in applicable law, which works well for determining the law that applies to the individual contract of employment with respect to a single employer is wholly unsuited for application in relation to cross-border transfers of undertakings.[852] It is precisely a change in the legal position of the affected employees that the provisions involving a transfer of undertaking seek to prevent. Hence, a change in applicable law is entirely contrary to the aim and objectives of the Acquired Rights Directive which intends to safeguard the rights and obligations of the employees in the event of a transfer of undertaking. This changeability of the applicable law by reason of a change in habitual place of employment shows the incapability of (a stringent application of) the conflict of laws provision for individual contract of employments to adequately deal with issues involving a transfer of undertaking. To my mind, even if seeking connection to the individual employment contract, the applicable law should be decided at the time of the transfer, since this is the

[851] *Cf.* Mankowski, 2003, p. 23 *et seq*; C-37/00 *Weber v Ogden Services*, para. 52; Niksova 2014, p. 91.

[852] One could potentially argue that in determining the applicable law to a transfer of undertaking one should fixate the time of determination of the applicable law to the time of the transfer, however, Article 8 Rome I Regulation does not allow for such fixation. On the basis of Article 8 Rome I Regulation, the applicable law to the individual employment contract is subject to change since it is not fixated in time. (*Cf.* Niksova 2014, p. 89; Junker 2005, p. 735). Allowing a temporal fixation for transfers of undertakings would mean the inclusion of a separate conflict of laws rule for transfers of undertakings.

time at which the employee relationships existing with the transferor will transfer to the transferee.[853] The employment contract by its very nature is characterized by continuity; it constitutes a continuing or lasting agreement whereas a transfer of undertaking occurs at a set moment in time. Whereas a change in the applicable law does not suit a transfer of undertaking, the changeability of the applicable law works well for continuing performance agreements, such as an employment contract since it gives legal footing to a factual and lasting change in working environment. The problems with subjecting the applicable transfer law to change by not designating the applicable law at the time of the transfer, can be shown by the following example: An undertaking situated in the Netherlands is transferred to a Dutch transferee. In connection with the transfer the undertaking is transferred to Curaçao.[854] At the time of the transfer Dutch law governs any claims arising out of unfair dismissal as the habitual place of employment is located in the Netherlands. After the transfer, the undertaking is continued in Curaçao, a non-Member State who's law is absent of any acquired rights provisions such as those affording protection against dismissal in the event of a transfer. The Acquired Rights Directive aims to protect all those employees employed in an undertaking that is situated within the territory of a European Member State upon or immediately prior to the transfer. As such, the application of the directive and its national counterparts extends to outbound-transfer scenarios where the undertaking is transferred from an EU Member State to a third country. Seeking connection to the last place of habitual employment, i.e. Curaçao, would result in a loss of acquired rights. In this scenario, contrary to the aims and purpose of the Acquired Rights Directive, the employee would lose all acquired rights at the moment he decides to continue his employment with the transferee at the new location. In fact, the transferee is free to dismiss the employee once he starts to work in Curaçao. In these types of outbound-transfer scenarios the change in

[853] Another argument against the change in applicable law may be found in the similarity to the conflict of laws assessment of contract acquisition or the assignment of debts, which is utilized as a justification for the assimilation of transfers of undertakings under the conflict of laws category of employment contracts. Under the conflict of laws assessment of contract acquisition the transfer of a contract is governed by the law that governs the contract itself. This law continues to be decisive after the transfer.

[854] The law of Curaçao does not possess any provisions akin to the Acquired Rights Directive or the transfer of undertaking provisions contained in Dutch law.

applicable law resulting from the application of the habitual place of employment, which contrary to the provisions of Acquired Rights Directive, does not result in the application of the laws of a Member State, would have to be remedied by other means than connection to the individual employment contract.[855]

In defining the applicable law to a transfer of undertaking it is important to draw a clear distinction between the law that governs the employment contract itself and the law that governs the rights and obligations stemming from a transfer of undertaking. One difference with the individual employment contract lies therein that at the time of a transfer of undertaking rights and obligations arise that affect the transferor, transferee, the employee and possible third parties. It is for these issues involving a transfer of undertaking only, that the applicable law should be decided at the time of the transfer. All other individual employment related issues are decided on the basis of a different timeframe, usually by connection to the last habitual place of employment. It are these combined rights and obligations, those stemming from the transfer of undertaking itself and those individual employment rights and obligations that exist beyond the transfer of undertaking, that determine the legal position of the employees involved in a cross-border transfer of undertaking. Thus, in determining the law that applies to the individual employment contract a different timeframe is decisive than in determining the law that applies to a transfer of undertaking. In the latter situation, by seeking connection to the individual employment contract, the location of the place of habitual employment at the time of the transfer should be decisive. In assessing when a transfer has occurred it is important to remember that a transfer of undertaking may be a gradual process making it hard to pinpoint the exact time at which the undertaking is transferred to the transferee. The time or the date at which the transfer takes place is not dependent upon an agreement between the transferee and transferor, rather the date of the transfer, as formulated by the ECJ in *Celtec*:[856]

[855] Such a remedy may be found in applying the Dutch acquired rights provisions as having an overriding effect on the *lex causae*; *Cf.* Kania 2012, p. 138, 180 *et seq*.; Niksova 2014, p. 101-103.

[856] Case C-478/03 *Celtec Ltd v John Astley and Others* [2005] ECR I-4389, ECLI:EU:C:2005:321.

> 'is the date on which responsibility as employer for carrying on the business of the unit transferred moves from the transferor to the transferee. That date is a particular point in time which cannot be postponed to another date at the will of the transferor or transferee.'[857]

Thus, even though the issue of transfers of undertakings should, in my opinion, constitute a separate conflict of laws category, if connection is sought to the individual contract of employment, as is the prevailing opinion, the applicable law to a transfer of undertaking should be determined at the date of the transfer. In doing so, one should establish the habitual place of employment on the date of the transfer. In determining the date of the transfer the case law of the European Court of Justice held under the Acquired Rights Directive, such as the decision in *Celtec*, should hold some relevance. My beliefs on this matter however, do not appear to be shared by the existing legal community. It is generally considered that if seeking connection to the individual employment contract, a *conflit mobile* will arise whenever a transfer of undertaking is coupled with a cross-border relocation of the habitual place of employment. In essence, in situations involving a cross-border transfer of undertaking that is accompanied by a cross-border relocation the question arises whether, in seeking connection to the individual employment contract, the applicable law changes due to a change in the habitual place of employment of the affected employees. Under a strict application of the employment provisions of Article 8 Rome I Regulation and Article 6 Rome Convention such a change is likely to occur. The following paragraphs will examine the effects of such a change and the views portrayed to remedy the *conflit mobile*.

**5. Conflit mobile**

As outlined in the previous paragraph, in determining the law that applies to (the effects of) a cross-border transfer of undertaking the conflict of laws connection to the individual employment contract is likely to result in a change in applicable law upon relocation of the undertaking abroad. The law that applies to the individual contract of employment is by its very nature

[857] Case C-478/03 *Celtec Ltd v John Astley and Others* [2005] ECR I-4389, ECLI:EU:C:2005:321, para. 36, 44.

subject to change due to the fact that, under the conflict of laws, failing a choice of law, connection is commonly sought to the habitual place of employment.[858] Thus, a change in the habitual place of employment may result in a change in applicable law due to the importance of the place of habitual employment as the primary objective connecting factor and the insignificance of the moment of conclusion of the employment contract.[859] The change in the applicable law is due to a change in the objective connecting factors and does not depend on the consent of the affected parties.[860] The restriction that the moment of conclusion of a contract is decisive in determining the applicable law to a contract does not extend to international employment contracts. As such, the law objectively determined by the primary objective connecting factor of the place of habitual employment is in principle subject to change.[861] Such a change in the habitual place of employment does not constitute a retroactive change in the applicable law.[862] Instead, the applicable law conforms to the habitual place of employment in the respective periods of time.[863] Rights and obligations concluded before and facts occurring before the change in the applicable law will be governed by the laws of the former place of work whereas facts, rights and obligations stemming from after the change in applicable law will be governed by the laws of the existing habitual place of employment.[864] However, claims arising from the continued employment contract, such as leave and pension entitlements, are subject to the new law governing the individual employment contract.[865] Accordingly, in determining the *lex loci*

[858] *Cf.* Niksova 2014, p. 89; Mankowski 2003, p. 23; Thüsing 2003, p. 1307; Deinert 2009, p. 145; Kania 2012, p. 101; Spickhoff, BeckOK 2013 VO (EG) 593/2008 Art. 8, Beck'scher Onlinekommentar BGB, para. 23; Däubler 1994, p. 130.

[859] Niksova 2014, p. 90; Thüsing 2003, p. 1307.

[860] Thüsing 2003, p. 1307; Surely the parties may (implicitly) agree tot the change in applicable law accompanying the change in employment location.

[861] Thüsing 2003, p. 1307, 1308; Niksova 2014, p. 89-91; Leuchten 2012, p. 414, 416; Rolfs, BeckOK KSchG § 1, Beck'scher Online-Kommentar Arbeitsrecht 2015, para. 418.1; Franzen 1994, p. 102.

[862] Mankowski 2003, p. 21, 25 *et seq.*; Spickhoff, BeckOK 2013 VO (EG) 593/2008 Art. 8, Beck'scher Onlinekommentar BGB, para. 23; Franzen 1994, p. 105.

[863] Spickhoff, BeckOK 2013 VO (EG) 593/2008 Art. 8, Beck'scher Onlinekommentar BGB, Rn. 23.

[864] Niksova 2014, p. 90; Franzen 1994, p. 105; Kania 2012, p. 104.

[865] Franzen 1994, p. 105 *et seq.* ; Niksova 2014, p. 90.

*laboris,* the existing timeframe is decisive, i.e. after the relocation the employment contract will be governed by the laws in force at the new place of establishment.[866] The conflict of laws connection to the individual contract of employment generally results in the application of the *lex loci laboris,* causing the relocation of an undertaking to effectuate a change in applicable law, due to a change in the objective connecting factor, i.e. the *locus laboris.*[867] In other words, upon a transfer of undertaking, following the relocation to a foreign country the habitual place of performance of employment and thus the law that applies to the individual contract of employment (in the absence of a choice of law contained therein) will prospectively change. In situations where the affected employees are unwilling to or are yet to perform their employment at the new location the question arises whether the change in habitual place of employment transpires simultaneous to the relocation of the undertaking.[868] On the basis of Article 8(2) Rome I Regulation the place of habitual performance as the place where the employee generally performs his work in the fulfillment of his employment contract is decisive. As such, it seems logical to subject the affected employees to an altered employment law only if they are contractually obliged to perform their employment at the new location.[869] Indeed, a mere change in the place of employment without the employees being required to perform their employment at the new location does not constitute a change in the law applicable to the employment contract.[870] Article 8 of the Rome I Regulation does not merely require the affected employees to be obliged to perform their employment at the new location. What is decisive is whether the employees actually continue their employment at the new place of establishment. Only when the affected employees have continued their employment abroad will the law that applies to their employment contract be subject to change due to the altered objective connecting factor of the habitual place of employment.[871] Still, a cross-border transfer of undertaking entailing a relocation from one country

[866] Provided that the affected employees continue their employment at the new place establishment. *Cf.* Franzen 1994, p. 102.
[867] *Cf.* Franzen 1994, p. 101.
[868] Franzen 1994, p. 104.
[869] Franzen 1994, p. 104.
[870] Niksova 2014, p. 96; Franzen 1994, p. 104.
[871] Kania 2012, p. 103 *et seq*.; Niksova 2014, p. 96.

to another and the accompanying change in habitual place of employment will regularly result in a change in applicable law.[872] The employees that are willing to continue their employment abroad upon a transfer of undertaking will therefore likely be subject to a change in the applicable employment law. A resulting question is whether this altered applicable employment law also effectuates a change in the law that applies to a transfer of undertaking and the rights and obligations stemming therefrom. Is the law that applies to a transfer of undertaking cemented at the time of the transfer or is it subject to change once the transfer is accompanied by a simultaneous or subsequent relocation?

*5.1 Substitution*

A strict application of the law that applies to the employment contract, throughout Europe undeniably effectuated by the application of Article 8(2) Rome I Regulation, will result in a change in the law that governs the transfer of undertaking upon relocation of the undertaking abroad. In this sense, it is perceivable that the change in the applicable law would render the transfer of undertaking ineffective or that it would result in e.g. a loss of acquired rights or a loss of protection against dismissal.[873] A relocation that takes place immediately after a transfer of undertaking is likely to result in the instantaneous loss of the continued application of the employment rights and obligations existing at the time of the transfer.[874] However, since the Acquired Rights Directive requires the Member States to provide the minimum standards contained in the directive, throughout the European Union, in intra-European transfer scenarios, the laws existing in the country of destination should guarantee the continuation of acquired rights upon a transfer of undertaking. In these cases, a loss of acquired rights upon a transfer of undertaking would conflict with the very nature and aim of

[872] Such a change in applicable law will only be absent where the parties have included a choice of law in the employment contract or where the applicable law to the employment contract is established on another basis then by connection to the habitual place of employment, e.g. by connection to the engaging place of business (cf. Art. 8(3) Rome I Regulation) or by connection to a country to which the contract is more closely connected due to the circumstances of the case (cf. Art. 8(4) Rome I Regulation).

[873] Ebert 2008, p. 150.

[874] This loss is due to a change in the habitual place of employment at the moment of relocation of the business.

Acquired Rights Directive which is to protect employees affected by the transfer of an undertaking that is located within EU territory. The directive itself makes no distinction between domestic and cross-border transfers of undertakings and guarantees the continuation of acquired rights irrespective of the destination or location of the undertaking after the transfer.[875] However, where in intra-European transfer scenarios the rights and obligations stemming from a transfer of undertaking may continue to exist due to the substitution of national acquired rights provisions of the Member State of origin by those of the Member State of destination, such substitution may not be possible in outbound transfer scenarios where the country of destination is located outside the European Union. In order to ensure the full application of the Acquired Rights Directive, via directive-compliant interpretation, the transfer of undertakings provisions existing in one Member State will have to be substituted, where such substitution does not exist automatically, by those existing in another, upon relocation of the undertaking to the latter Member State.[876] Substitution is only possible insofar as the foreign institution equates to the domestic concept of a transfer of undertaking or where its effects and function are considered equivalent.[877] Although directive-compliant interpretation may also warrant application of substitute acquired rights provisions in outbound transfer scenarios this will prove difficult where acquired rights provisions similar to those in effect throughout Europe are inexistent or where the relevant substantive law does not allow substitution.[878] In any case, the Member States will have to ensure the full application of the rights and obligations stemming from the Acquired Rights Directive whenever the undertaking to be transferred is located within EU territory as required by Article 1(2) of the directive. In this sense, they may have to give overriding mandatory effect to their national acquired rights provisions, as *lex fori*, whenever the laws of a European Member State are not objectively applicable to a transfer of undertaking that falls within the remit of the Acquired Rights Directive.[879]

[875] See Chapter 2, para. 3.
[876] Kania 2012, p. 344-345; Däubler 1994, p. 137.
[877] Kania 2012, p. 526.
[878] Kania 2012, p. 344-345; Däubler 1994, p. 137.
[879] *Cf.* Kania 2012, p. 345; For the classification of national acquired rights provisions as overriding mandatory provisions and the effects of such classification see paragraph 6.

*5.2 Intentional circumvention of acquired rights provisions*

Since a change in the applicable law to a transfer of undertaking is likely to occur upon the relocation of the undertaking abroad, a farsighted transferor may decide to transfer the undertaking or part of the undertaking to be transferred abroad prior to the transfer in order to achieve a change in the applicable law, thus circumventing any existing acquired rights provisions. This process, which is known as 'ship and fire', is most effective in outbound transfer scenarios, insofar as the laws of the country of destination are absent of any equivalent acquired rights provisions.[880] By carefully structuring the relocation and the transfer of undertaking the transferor may be able to manipulate the applicable employment law provisions. Doctrines such as the French doctrine of *'fraude à la loi'* could potentially deal with an intentional evasion of the applicable law. The problem with such doctrines, however, is that it may be very difficult to determine whether there exists a purposeful evasion of the applicable law or a legitimate avoidance thereof.[881] As such, there may be several legitimate reasons for the transferor to transfer his business abroad prior to a transfer of undertaking, such as tax benefits, market seeking or other strategic considerations. In this, it may be difficult to establish whether there was a purposeful evasion of national acquired rights provisions or whether the undertaking was transferred abroad for wholly legitimate reasons.[882]

*5.3 Cumulative approach*

In order to counteract the problems arising from a possible change in applicable law, it has been suggested that, in cross-border transfer scenarios, national acquired rights provisions are only to apply if the laws in force in the country of destination, frequently the country of the transferee, also provide for the continuation of rights and obligations stemming from a contract of employment upon a transfer of undertaking.[883] Although this approach is commonly known as the cumulative approach, it does not

[880] Ebert 2008, p. 151-152.

[881] Siehr 2006, p. 58.

[882] In addition, an *a posteriori* exception to the applicable law may give rise to legal uncertainty on the part of the affected employees as well as transferee and transferor; Cf. Parra-Aranguren 2006, p. 132.

[883] Drobnig & Puttfarken 1989, p. 239; Mankowski 1994, p. 97; Junker 1992, p. 231 *et seq.*; Junker 2012, p. 15; Leuchten 2012, p. 411; *Cf.* Niksova 2014, p. 97-99; Deinert 2013, p. 343.

prescribe a strict accumulation of laws in the sense that it requires the application of the laws in force in the country of origin and the country of destination. Instead, national acquired rights provisions are applied if the country of destination is equally equipped with national acquired rights provisions. The Acquired Rights Directive, however, does not require the laws of both the transferor and transferee to ensure the transfer of rights and obligations stemming from the existing employment contracts or relationships to the transferee. This view, which is portrayed in legal literature,[884] is contrary to both the aim of the directive, which is to safeguard the rights of employees employed in European based undertakings by reason of a transfer of undertaking, and Article 1(2) of the directive. Indeed, Article 1(2) merely requires the undertaking to be transferred to be located within a European Member State prior to the transfer. The view that both the laws in force in the country of the transferor and that of the transferee require the continuation of the existing employment relationships is akin to the view that limits the application of national acquired rights provisions to domestic territory. Surely, if a cumulative approach should be adhered to, the lack of any acquired rights provisions, similar to those provided by the directive, would result in the non-application of national acquired rights provisions and as such prevent a transfer of undertaking from taking place. In this sense, the application of national acquired rights provisions does not surpass national borders, unless the laws in force in the country of destination or that of the transferor expressly provide for the transfer of the affected employees to the transferee.[885] More so, requiring the laws of both the transferor and transferee to be equipped with provisions ensuring the automatic transfer of the employment contracts upon a transfer of undertaking conflicts with Article 1(2) of the Acquired Rights Directive, according to which the application of the directive is solely dependent on the geographical location of the undertaking to be transferred. The conflict of laws may not be utilised to thwart the application of the Acquired Rights Directive, which applies to intra-European and outbound transfers alike. Requiring the application of the laws in force at the location of both transferor (origin) and transferee

[884] Drobnig & Puttfarken 1989, p. 239; Mankowski 1994, p. 97; Junker 1992, p. 231 *et seq.*; Junker 2012, p. 15; Leuchten 2012, p. 411; *Cf.* Niksova 2014, p. 97-99; Deinert 2013, p. 343; Franzen 1994, p. 110 *et seq.*
[885] Franzen 1994, p. 107.

(destination) would result in the provisions of the Acquired Rights Directive not being applied to outbound transfers of undertakings. Third countries likely do not possess any provisions similar or equal to those of the Acquired Rights Directive, rendering a cumulative application of laws ineffective to achieving a transfer of undertaking. In this regard, it is argued that the justified reliance of the affected employees on the continuance of their employment relationship may not be undermined by the application of foreign law.[886] The cumulative approach to the conflict of laws in cross-border transfer scenarios may additionally be rejected for a variety of reasons. First there is no reason why an employee should be deprived from the application of the Acquired Rights Directive or its national counterparts when an undertaking is transferred to a state that does not make provision for the transfer of acquired rights. Employees that are affected by national or cross-border transfers of undertakings without relocation should not be better protected than those who are affected by a transfer of undertaking that is accompanied by a cross-border relocation.[887] Second, the idea of a cumulative approach is similar to and may be derived from the approach that exists in private international law to cross-border mergers and in general to cross-border transfers of (the seat of) companies. The success of a merger or cross-border seat transfer is generally reliant on the recognition of the merger or seat transfer and the continued existence of legal personality in the country of destination, whereas a transfer of undertaking occurs *ope legis* and applies to the effects of the transfer on the existing employment contracts and relationships and not the success of the merger or seat transfer in general.[888] In addition, the notion of employment protection, which lies at the heart of the Acquired Rights Directive, speaks against a cumulative application of the laws of transferee and transferor. In this sense, it is inconceivable why employees should be deprived from the protection afforded by the Acquired Rights Directive and its national counterparts, simply because of the nationality of the transferee or the relocation of the transferred undertaking upon or immediately after the transfer.[889] From a conflict of laws perspective the notion that multiple, possibly conflicting,

[886] Niksova, p. 99; Reichold 2008, p. 698, 702.
[887] Bittner 2000, p. 487.
[888] Bittner 2000, p. 487.
[889] Ebert 2008, p. 151; Bittner 2000, p. 487.

laws, i.e. legal systems, can simultaneously govern a single legal relationship cannot be justified either, as this would contradict with its very nature and purpose.[890]

*5.4 Postponed change in applicable law*

In an attempt to subvert the problems arising from a change in the applicable law to the employment contract and thus to the effects of a (cross-border) transfer of undertaking other authors have proposed to postpone the change in law for a period of one year.[891] *Däubler* and *Reichold* believe postponing the change in applicable law for a period of one year is the easiest way to comply with the provisions of the Acquired Rights Directive, which by reason of Article 1(2) does not limit the destination or location of the transferred undertaking after the transfer.[892] This postponement of change in the applicable employment law does not follow automatically from the Acquired Rights Directive or the conflict of laws provisions contained in the Rome I Regulation nor can it be read into any of these existing provisions.[893] The proposed reservation, limiting the change in applicable law for a set period, will ensure that the transferee continues the employment relationship with the workforce existing at the time of the transfer and will not be allowed to subject the affected employees to dismissal.[894] After the expiry of one year, the parties will be free to conclude differently. Before the reservation period has expired, the transferee as the new employer will possibly only be able to rely on the change in applicable law if he has validly concluded an agreement under the newly applicable law which corresponds to the employee protection offered by the acquired rights provisions in force in the country of origin, i.e. the place of establishment with the transferor.[895] In order to properly ensure the application of a one year reservation it has been proposed to alter the wording of Article 1(1) of the Acquired Rights Directive as to, in cross-border transfer scenarios, include an obligation for the transferee to continue the rights and obligations stemming from the

[890] Deinert 2013, p. 343; Franzen 1994, p. 111.
[891] Däubler 1994; Reichold 2008.
[892] Däubler 1994, p. 137.
[893] Däubler 1994, p. 137.
[894] Niksova 2014, p. 96.
[895] Däubler 1994, p. 137; Niksova 2014, p. 96.

employment relationship with the transferor for a period of one year.[896] To my mind however, the problems arising from the change in applicable law are an inevitable result of the conflict of laws connection to the individual contract of employment and the failure to limit the determination of the applicable law to the date of the transfer. As the conflict of laws consideration naturally precedes the application of substantive law I even wonder whether these problems can be remedied by a change in substantive law, i.e. the Acquired Rights Directive. From a conflict of laws perspective it would be difficult to effectuate a continued application of the existing employment provisions under the application of a different law. Surely a change in the Acquired Rights Directive requiring the transferee to, upon a cross-border transfer of undertaking, continue rights and obligations stemming from a contract or employment for a period of one year, does not alter the application of the respective substantive law. The national acquired rights provisions that apply before the cross-border relocation of the undertaking, by reason of the location of the habitual place of employment, are not granted continuing effect simply by adding this reservation to the directive and its national counterparts. The respective substantive law will still be subject to change due to a change in the habitual place of employment. As such, the law applicable to (the effects of) the transfer of undertaking is altered *ex nunc* from the time of the change in the location of habitual employment, leaving the transferee unbound by the previous substantive law, including a provision which would require continued application of rights and obligations stemming from the employment contract for a period of one year. It seems to me that a solution to the problem of a change in the applicable law to (the effects of) a transfer of undertaking should be found in the conflict of laws rather than in substantive law.[897] Additional arguments against including a time restriction for cross-border transfers of undertakings into the Acquired Rights Directive may be

[896] Reichold 2008, p. 770 *et seq.*

[897] To my mind such a 'conflict of laws' solution should be incorporated into the Acquired Rights Directive itself. See paragraph 8 of the current Chapter, which discusses my views on the appropriate conflict of laws approach for transfers of undertakings. In this paragraph I propose a conflict of laws solution for transfers of undertakings (to be incorporated into the Acquired Rights Directive) that does away with the problem of a conflit mobile. By seeking connection to the location of the undertaking to be transferred upon or immediately before the transfer no change in applicable law will occur.

found in legislative history. The initial 1974 proposal for the Acquired Rights Directive,[898] in Article 10, included a provision on the applicable labour law. It stated in paragraph 1, that the labour laws applicable to employment relationships prior to a merger or takeover should continue to apply after the merger or takeover has taken place. The premise of this paragraph however was that, in principle, an employee's place of work does not change as a result of an international merger or takeover.[899] More so, the first paragraph was rendered inapplicable in situations where a takeover or merger is accompanied by a cross-border relocation resulting in a valid transfer of the place of work to another Member State.[900] Legislative history therefore shows that a change in the applicable labour laws has always been considered an inevitable result of a change in the place of work to another (Member) State.[901] More so, the proposed restriction is not entirely in line with the aim and purpose of the Acquired Rights Directive, which makes no distinction between domestic and cross-border transfers of undertakings. The directive, in Article 3(1) does not impose a restriction on the period of observance of rights and obligations stemming from the contract of employment. The directive merely ensures that the transferor's rights and obligations arising from the employment contract or relationship are transferred to the transferee by reason of the transfer without subjecting the continuance of these rights and obligations to any time limit. Imposing such a time limit on the transferor in cross-border transfer situations would result in an inequality between domestic and cross-border transfers of undertakings, which is against the nature and aim of the Acquired Rights Directive. The directive seeks to protect the acquired rights of all those employees affected by the transfer of an undertaking that is situated within EU territory prior to the transfer irrespective of the location of the undertaking after the transfer. In conclusion, it appears that, when connecting the transfer of undertaking to the individual employment contract under the conflict of laws, a cross-border relocation of the undertaking will

[898] COM(74) 351 final/2.
[899] COM(74) 351 final/2, p. 12-13.
[900] COM(74) 351 final/2, Art. 10(2)
[901] Although the 1974 proposal speaks of a change in the applicable labour laws, it is unclear whether these were to include the law that applies to the transfer of undertaking as such. In any event, the 1974 proposal did not explicitly include any conflict of laws provisions with respect to the transfer of undertaking as such.

almost inevitably result in a change in the applicable law. Inserting a provision into the Acquired Rights Directive requiring the transferee to continue the acquired rights of the affected employees for a period of one year provides no solution to this change in applicable law. Since the change in applicable law is due to the objective conflict of laws reference rather than a choice of law made by the parties, the limits on party autonomy contained in Articles 3(4) and 8(1) Rome I Regulation offer no solution either. As such, a final option may be, if continuing to strictly assimilate the transfer of undertaking under the conflict of laws category for individual contracts of employment, to attribute overriding mandatory effect to the national implementation provisions of the Acquired Rights Directive.

**6. Overriding mandatory provisions**

Certain mandatory rules of law require application irrespective of the applicable law, i.e. irrespective of the choice of law made by the parties or the law assigned by the conflict of laws rules in the absence of such choice. These overriding mandatory rules or super-mandatory provisions 'override' the *lex causae* by virtue of their special nature and purpose. Primarily intended to protect public interests, they commonly bypass the result of the conflicts of laws reference. As such, the interests in applying these provisions outweigh the interests in upholding the result of the conflict of laws reference. The problem of overriding mandatory provisions is generally considered enthralling from a theoretical or dogmatic viewpoint rather than being of large practical importance.[902] As discussed above, there are several theories on establishing the applicable law to a transfer of undertaking. Surely, if considered a special conflict of laws category, containing a conflict rule similar to the scope rule that exists within the directive, i.e. that the law that applies to a transfer of undertaking is the law of the country in which the undertaking, immediately prior to or on the date of the transfer, was located, the need for the classification of the provisions on transfers of undertakings as overriding mandatory rules becomes of little importance. In other words, the doctrine of overriding mandatory provisions only has an effect when these provisions override the law that would otherwise be applicable. If the provisions that may be considered overridingly mandatory are already applicable by reason of the general conflict of laws reference, which is e.g.

[902] See Magnus & Mankowski 2002, p. 31.

the case under the Rome I Regulation,[903] the need for their overriding mandatory nature surpasses.[904] Under the Rome I Regulation, overriding mandatory rules are considered part of the *lex causae.* In this however, the question may arise whether the regulation allows for an exception to this notion in cases where an overriding mandatory provision is equipped with a distinct scope rule, allowing its non-application despite being part of the *lex causae.*[905]

Still, in cases of transfers of undertakings, the doctrine of overriding mandatory provisions is most relevant where the *lex causae* differs from the law that includes a provision that requires application by reason of its special nature and purpose. Assimilated under the conflict of laws category for individual employment contracts the doctrine overriding mandatory provisions gains ever more importance. As stated in paragraph 5, due to the general application of the objective connecting factor of the place of habitual employment the law that applies to a transfer of undertaking is subject to change once a transfer of undertaking is accompanied by a cross-border relocation of the undertaking and the place of work. This change in applicable law may be remedied by the doctrine of overriding mandatory provisions. Hence, where it concerns the Acquired Rights Directive and the transfer of undertakings provisions that exists in national law the interest in the doctrine surpasses that of mere dogmatism and moves towards the practical applicability of national law provisions. Within this context questions arise such as whether the Acquired Rights Directive encompasses rules that are overridingly mandatory in nature or whether there (can) exist minimum harmonisation Community provisions with an overriding

[903] Under the Rome I Regulation however, overriding mandatory provisions are considered applicable because they are part of the *lex causae*: Strikwerda 2015, p. 159; Wagner 2008, p. 15.

[904] This view is not universally shared. In the Dutch opinion overriding mandatory rules do not necessarily require application simply because they are part of the *lex causae.* According to this view overriding mandatory rules require application by reason of their distinct nature and purpose and could, in principle, not apply even though they are part of the *lex causae*: HR 5 June 1953, *NJ* 1953/613; HR 8 January 1971, *NJ* 1971/129; Van Hoek 2000, p. 454; Strikwerda 2015 I, p. 159.

[905] Strikwerda 2015 I, p. 159.

mandatory component.[906] In addition, there exists the question of whether provisions of weaker party protection can amount to overriding mandatory provisions within the prevailing definition. Thus the perpetual question of whether and under what conditions a provision is to be classified as internationally mandatory requires answering.[907] In order to answer this question and the above, address must first be given to the definition of overriding mandatory provisions.

*6.1 Definition*

As set out above, there does not exist a special conflict of laws provision pertaining to the transfer of undertakings in the majority of the Member States or the Rome Convention and Rome I Regulation.[908] Yet, the absence of such a provision has never passed doubt on the obligatory nature of the acquired rights provisions. As such it may even be argued that the mandatory nature of the acquired rights provisions requires their direct application thus rendering special conflict of laws rules superfluous. Whether the acquired rights provisions in effect amount to rules with an autonomous international scope is largely dependent on the definition awarded to overriding mandatory rules under the conflict of laws. Article 9 of the Rome I Regulation, comprises a special provision for overriding mandatory rules. Surely, the Rome I Regulation only applies in situations falling within its substantive scope, i.e. 'situations involving a conflict of laws, to contractual obligations in civil and commercial matters.' To this end it should be noted that to my mind the provisions on transfers of undertakings, although closely connected to the existing employment contracts, do not constitute contractual obligations as they arise by operation of law, irrespective of the intentions of the affected parties. As such, I believe issues concerning transfers of undertakings to be outwith the scope of the Rome I Regulation. However, if assimilated under the conflict of laws category of individual

[906] More so, if these questions require a positive answer the problem of conflicting rules of an overriding mandatory nature arises. Do the overriding mandatory rules of the *lex fori* surpass those of other European Member States or third states where they are similar in nature or should a best or most beneficial law approach be deployed?

[907] *Cf.* Magnus & Mankowski 2002, p. 33.

[908] Such a special conflict of laws provision appears to exist in the United Kingdom, Luxembourg and Malta in the form of a unilateral conflict of laws provision requiring application of national acquired rights provisions whenever the undertaking to be transferred is located within the distinct territory of the respective Member States.

employment contracts issues arising from a transfer of undertaking may be subject to the provisions of the Rome I Regulation. In this sense, the application of the Rome I Regulation is either extended to transfers of undertakings by reason of the domestic conflict of laws or the Rome I Regulation is considered directly applicable due to the transfer's close relation with the individual employment contract(s). In the latter view, the acquired rights provisions and the rights and obligations stemming therefrom are considered contractual by reason of their connectedness to the individual employment contract. As such, under the private international law of the Member States, the Rome I Regulation may be applied to issues concerning a transfer of undertaking. Article 9 of the Rome I Regulation,[909] unlike its predecessor Article 7 of the Rome Convention which provides no definition of the concept,[910] in paragraph 1 describes overriding mandatory provisions as 'provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable'. This definition, which stems from the ECJ's judgment in *Arblade*[911] appears to be modelled on the words of French author *Francescakis,* who defined overriding mandatory provisions as *'lois dont l'observation est necessaire pour la sauvegarde de l'organisation politique, social ou économique du pays'.*[912] He labelled these rules '*lois d'application immédiate'* or '*lois de*

[909] The notion that overriding mandatory rules differ from mandatory rules within the meaning of Article 8 of the Rome I Regulation, i.e. 'rules that cannot be derogated from by agreement', is encased in recital 37 of the Rome I Regulation according to which:' Considerations of public interest justify giving the courts of the Member States the possibility, in exceptional circumstances, of applying exceptions based on public policy and overriding mandatory provisions. The concept of 'overriding mandatory provisions' should be distinguished from the expression 'provisions which cannot be derogated from by agreement' and should be construed more restrictively.'

[910] In its 2002 Green paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernization the Commission asked whether the application of Article 7 of the Rome Convention required definition, COM (2002) 654 final, p. 38.

[911] Art. 9(1) of the Rome I Regulation is directly based on the definition of mandatory rules in the decision of the ECJ in *Arblade* (Cases C-369/96 and C-374/96 *Arblade* [1999] *ECR* I-8453, ECLI:EU:C:1999:575, para. 30); Racine 2012, p. 62.

[912] Francescakis 1966, p. 1.

*police'*.[913] The etymological origin of the latter wording shows the public law nature of these rules. The description '*lois de police'* is derived from the Greek word *politea* [πολιτεία] which, although difficult to translate to our present understanding, finds its essence in the objective organisation of the functions of government.[914] As such '*lois de police'* or overriding mandatory rules include provisions that entail the organization of a state.[915] These rules evidently include public law provisions with a direct effect on private legal relationships. As such, an overriding mandatory provision, is primarily intended to serve public, instead of private, interests and should be of such importance that a state requires its application to all persons within its territory.[916] The Rome I Regulation, in Article 9, however, recognises that the scope of overriding mandatory provisions may go beyond national territories and merely refers to 'situations falling within their scope'.[917] In addition, the definition provided by Article 9, as is clear from the insertion of the words 'as such', does not limit the application of public interest provisions to those of a political, social or economic nature. In essence the provisions that are classified as overridingly mandatory involve public interests that transcend the contractual relationship existing between the parties.[918] Even though provisions with a clear public interest are considered overriding mandatory provisions, the definition of overriding mandatory rules is subject to continuing debate with one of the most controversial issues being whether provisions of weaker party protection are encompassed by the definition provided in Article 9 Rome I Regulation.[919] In fact, the position of provisions that are intended to protect socially or economically weaker parties still appears undetermined.[920] As mentioned above, the controversy first and foremost extends to provisions that are primarily intended to safeguard the socially or economically disadvantaged, such as the acquired rights provisions.[921] These provisions of weaker party

[913] Francescakis 1958; Francescakis 1966.
[914] Wolff 2014, p. 801-802; McFarland 2015, p. 685; Kuipers 2012, p. 63.
[915] Kuipers 2012, p. 63.
[916] Magnus & Mankowski 2002, p. 33.
[917] Hellner 2009, p. 457.
[918] *Cf.* Solomon 2008, p. 1735; Beukler 2005, p. 29.
[919] Renner 2015, p. 250.
[920] See, *inter alia*, Kuipers & Vlek 2014, p. 202; Vonken 2012 (*T&C Burgerlijk Wetboek*), Art. 10:7 BW, note 4b; Van Hoek 2009, p. 79-81.
[921] See *e.g.* Kuipers & Vlek *NIPR* 2014, p. 202; Henckel 2012, p. 386.

protection have traditionally been considered as being overridingly mandatory if they are partly intended to protect certain communal interests.[922] The mere intention of protecting socially or economically weaker parties does not justify the direct application of these provisions in spite of a choice of law or the law that would otherwise govern the contract. In order for a certain provision to override the *lex causae* it must inhabit certain public interests. For instance, in the *Sorensen/Aramco*[923] decision the Dutch *Hoge Raad* ruled on the application of a Dutch employment law provision to an employment contract governed by the laws of the state of Texas, USA. By reason of Article 6 *Buitengewoon Besluit Arbeidsverhoudingen (hereinafter: BBA)* an employer required prior consent from an employment office before proceeding to the termination of an existing employment contract or relationship. The aim of this provision was twofold: first the provision aimed to shield the affected employees against a socially unjustified termination of their employment contract, second it aimed to protect the Dutch labour market as a whole.[924] The mere intention of protecting (the affected) employees was not considered to justify traversing the *lex causae.* Such justification can, according to the *Hoge Raad*, only be found therein that the socio-economic relations in the Netherlands are involved to such an extent that the interests protected by the provision outweigh the interests in fully applying the foreign law that applies to the employment contract.[925] Thus, only in those situations where the socio-economic relations in the Netherlands are largely involved in the case will the interests protected by Dutch overriding mandatory provisions be able to prevail over the law that applies to the contract. Hence, in the case of Article 6 BBA it was the involvement of the Dutch labour market rather than the protection of the individual employee that justified giving overriding effect to this provision. It has been argued that the same reasoning should extent to European directives in the sense that the national implementation provisions of the Member States should only require application in situations involving the socio-economic relations within the EU to such an extent that

[922] Strikwerda 1978, p. 67; Van Hoek 2014, p. 470; De Boer 1998; De Boer 2003, p. 466.
[923] HR 23 October 1987, *NJ* 1988/842 *(Sorensen/Aramco).*
[924] HR 23 October1987, *NJ* 1988/842 *(Sorensen/Aramco)*; A.P.M.J. Vonken (Asser), 10-I Algemeen Deel IPR 2013, 495.
[925] HR 23 October 1987, *NJ* 1988/842 *(Sorensen/Aramco)*, para. 3.2.2; HR 8 January 1971, *NJ* 1971, 129; Verhagen 2002, p. 144.

this involvement justifies surpassing the *lex causae.*[926] Only when serving a purpose exceeding the interests of the individual will there be sufficient justification for attributing overriding effect to a mandatory provision of law.[927] Giving effect to this statement a keen observer might argue that a large variety of employee protective provisions may be regarded as serving a higher interest and as such could bear the hallmark of overriding mandatory provision. Yet, in recent years this view has somewhat eroded due to the rise of the protection principle under the conflict of laws. Whilst the provisions protecting weaker parties, such as employees, have a semi-public law impact in the sense that the abuse of the socially disadvantaged threatens the legal community as a whole, the advent of the conflict of laws rules based on the protection principle appears to have rendered overriding mandatory rules of this category virtually redundant.[928] Under the principle of protection, the conflict of laws reference is shaped in such a way as to best protect the weaker party. Thus, for individual employment contracts connection is sought to the place of habitual employment.[929] Given the inherent protective nature of employment law this connection ensures that the employee is protected by the laws and standards of the place where he habitually carries out his work.[930] A corresponding protection is afforded to the employee as against a choice of law clause under Article 8(1) Rome I Regulation, which provides that a choice of law may not deprive the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable.[931] As such a choice of law in the employment contract cannot deprive the affected employees from the protection of the mandatory provisions in force at their habitual place of employment.[932] When the conflict of laws rule

[926] Verhagen 2002, p. 145.

[927] Battifol & Lagarde, p. 428; Verhagen 2002, p. 145.

[928] Strikwerda 2012, p. 67; De Boer 2003, p. 466; Verhagen 2002, p. 145; Renner 2015, p. 251.

[929] See Art. 6 Rome Convention and Art. 8 Rome I Regulation; See paragraph. 4.3.2 of this Chapter.

[930] Strikwerda 2012, p. 37; Van Lent 2000, p. 85.

[931] *Cf.* For consumer contracts: Solomon 2008, p. 1731.

[932] The law that applies to an employment contract is most frequently established by reason of the primary objective connecting factor of the place of habitual employment. If such a place cannot be readily determined the location of the engaging business is decisive in determining the applicable law. However, if it appears from the circumstances as a whole that the contract

selects the legal system that is best qualified to apply its employee protective provisions, the concomitant application of the protective provisions of other legal systems on the basis of the doctrine of overriding mandatory rules is rendered superfluous.[933] The latter doctrine therefore seems exclusively reserved for provisions that intervene in private legal relationships for the protection of public interests, frequently referred to by the German term *Eingriffsnormen*.[934] Rules and regulations that are primarily intended to balance the interests of contractual parties with different bargaining powers are generally not encompassed by the abovementioned term. They serve private interests in the sense that they seek to strike a balance between the interests of the parties involved in the contract and are therefore primarily connected to the contract itself, justifying their conflict of laws connection by way of the general rules, making them subject to the *lex causae.*

*6.2 Overriding effect of national acquired rights provisions*

Since overriding mandatory provisions should be intended to serve a public interest in order for their overriding effect to be justified the classification of national acquired rights provisions as being overriding mandatory requires an examination of the nature and purpose of these provisions. In this sense, national acquired rights provisions may only be classified as overriding mandatory provisions under Article 9 of the Rome I Regulation if their interests surpass the protection of the individual employee. The provisions are therefore required to inhabit certain communal interests. In this context, the German *Bundesarbeitsgericht* has ruled against the application of the main German provision transposing the Acquired Rights Directive as *Eingriffsnorm.* In the so-called *Amerikanische Piloten*[935] case, the BAG

is more closely connected with another country then the law of that country shall apply. In any event, the mandatory provisions of the objectively applicable law, either established by the habitual place of employment, the engaging place of business or by the existence of a closer connection to another country, apply irrespective of the existing choice of law.

933 This is also true in relation to Art. 9 Rome I Regulation. Where certain provisions have other aims of protection than the individual employee Art. 9 may be applied, as is, e.g., the case with the Posted Workers Directive which seeks to prevent the European free movement of labour from causing social dumping and distortions to competition.

934 U. Magnus, J. von Staudinger - Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Art. 9 Rom I Vo, para. 5; Mankowski 2006, p. 109-110.

935 BAG 29 October 1992 – 2 AZR 267/92.

essentially held that § 613a BGB lacks the collective interest required for the classification as overriding mandatory as the central purpose of the provision is to secure that individual employees are protected against the loss of employment.[936] According to the facts of this case the American plaintiffs were employed as pilots by Pan American World Airways (hereinafter: Pan Am). They primarily flew domestic German flights, operating from the Pan Am basis in Berlin. At a certain point the latter undertaking, i.e. the Pan Am basis in Berlin, was transferred to Berliner Lufthansa Airport Services GmbH (hereinafter: Lufthansa) with the aim of providing Lufthansa with the ability of performing domestic air traffic from Berlin. According to the agreement Lufthansa was obliged to take over the existing personnel with the exception of the pilots, flight engineers and the Pan Am US dollar payroll employees. In addition, a charter agreement enabled Lufthansa to temporarily operate the airplanes owned by Pan Am utilised in the Berlin air traffic with the existing cockpit crews, cabin crews and other services. As part of the charter agreement the plaintiffs were involved in the domestic air traffic to and from Berlin. After the termination of the charter agreement the plaintiffs did not become employed by Lufthansa and claimed their employment contracts had transferred to Lufthansa by reason of a transfer of undertaking on the basis of § 613a BGB. Since the employment contracts were subject to the laws of New York, both by choice of law and by reason of the objective conflict of laws connection of a closer connection, the German acquired rights provisions did not apply to the case. The *BAG* therefore had to decide whether overriding effect was to be attributed to its national acquired rights provision(s), i.e. § 613a BGB. In this, the aim of the provision is decisive. If the provision is primarily intended to protect the interests of the individual, by striking a balance between the interests of the employee and his employer, the provision is not eligible for overriding effect on the basis of Article 7 Rome Convention, the predecessor of Article 9

[936] BAG 29 October 1992 – 2 AZR 267/92, para. IV 2 a; also see BAG 24 August 1989, *IPRax* 1991, 407. The judgment has been strongly criticised in legal literature. Some authors applaud the denial of overriding effect in view of the interests that the provision aims to protect, whereas others profusely disagree with the decision. They opine that provisions protecting employees often originate from public interests, which makes these provisions particularly suitable for application as overriding mandatory rules.

Rome I Regulation (in Germany transposed into Art. 34 EGBGB).[937] As such, provisions that are aimed at protecting individual interests are subject to the *lex causae.* Only those provisions that are aimed at protecting interests that surpass those of the individual, i.e. that go beyond the interests of the parties to the contract, such as socio-economic interests, may be branded overriding mandatory under Article 7.[938] In essence, provisions of merely mandatory (contractual) weaker party protection are considered part of the *lex causae* whereas rules or provisions that serve a public interest may have overriding mandatory effect.[939] Both types of provisions are mutually exclusive in the sense that provisions that follow the general multilateral conflict of laws rule cannot be the subject of unilateral overriding application. In other words, there is exists no overlap between Articles 6 and 7 of the Rome Convention[940], since both provisions are aimed at different types of norms. According to the *BAG* the primary purpose of § 613a BGB is to protect the employees against a loss of employment by ensuring the continuance of their employment relationship and protecting them against dismissal. This protection against dismissal is intended to balance the interests of the employee and the interests of the employer in the contractual freedom to freely dispose of his undertaking without taking the existing relationships into account. An additional aim of the provision is to ensure the continuity of the existing workers council or representation, to determine the liability of the old and the new employer and to regulate the effects of the transfer on collective and company agreements. These collective elements however are subordinate to the protection of the employees and the continuance of the employment contract. As such, the acquired rights provision of § 613a BGB is part of individual employment law rather than collective in nature.[941] Given the primary individual purpose the *BAG* ruled against the application of § 613a BGB as *Eingriffsnorm* within the meaning of Article 34 EGBGB, i.e. mandatory rule with overriding effect under

[937] BAG 29 October 1992 – 2 AZR 267/92, para. IV 1; This reasoning is likely extended to Article 9 of the Rome I Regulation.
[938] BAG 29 October 1992 – 2 AZR 267/92, para. IV 1; *Cf.* Mankowski 1994, p. 94.
[939] Mankowski, p. 94; Van Hoek 2014, p. 166;
[940] The same reasoning will apply to Articles 8 and 9 of the Rome I Regulation.
[941] BAG 29 October 1992 – 2 AZR 267/92, para. IV 2b.

Article 7 Rome Convention.[942] The *BAG* concluded that neither § 613a BGB nor the national acquired rights provisions of another Member State were applicable, even though the undertaking transferred was situated in Germany both before and after the transfer.

*6.2.1 Critique*

In the prevailing opinion in both literature and case law the national provisions transposing the Acquired Rights Directive befall the general conflict of laws reference existing for the individual employment contract and do not constitute provisions with overriding mandatory effect.[943] However, the decision of the *BAG* has also been met with resistance,[944] which is to be applauded since the ruling in this case abundantly conflicts with Article 1(2) of the Acquired Rights Directive, according to which the national acquired rights provisions of a Member State should always apply whenever the undertaking to be transferred is situated in European territory. More so, the *BAG* should have utilized a directive-compliant interpretation ensuring the application of Article §613a BGB, irrespective of the employment contract being governed by the laws of the State of New York both by reason of choice of law and as applicable law in the absence of choice (due to the law of the habitual place of employment being set aside by reason of the circumstances of the case making the contract more closely connected with the State of New York). Surely, the result of the conflict of laws reference (in this case connection is sought to the employment contract) should not be able to set aside the mandatory provisions arising from the Acquired Rights Directive. *A fortiori*, Article 1(2) of the Acquired Rights

[942] Since § 613a BGB codifies most of and the most important provisions of the Acquired Rights Directive, the provisions of the Acquired Rights Directive, according to the German view, do not encompass overriding mandatory provisions.

[943] See *e.g.* Niksova 2014, p. 89, 101; Däubler 1994, p. 126; Franzen, 1994, p. 124-125; Junker 1992, p. 293. Leuchten 2012, p. 411-416; Reiner 2010; Gaul & Mückl 2011; Junker 2014; Ebert 2008; Olbertz & Fahrig 2012; CMS report 2006; Veldmaat & van Assendelft de Coningh; Däubler 2013, p. 344-345; Von Alvensleben 1992; *Cf.* HR 1 december 1995 *NJ* 1997, 716 m.nt. Strikwerda; Ktr. Tilburg 26 July 2007, *JAR* 2007/259, ECLI:NL:RBBRE:2007:BB7066; Ktr. Zaandam (Vzr.) 26 July 2007, *JAR* 2008/67; Ktr. Eindhoven (vrz.) 9 September 2008, JAR 2008/271, ECLI:NL:KTGEIN:2008:BG3811; *Cf.* Laagland 2011; Henckel 2012; Haanappel-van der Burg 2015; Haanappel-van der Burg 2016 I; Bittner 2000; Fetsch 2002.

[944] Wimmer 1995 p. 207 *et seq*; Mankowski 1994.

Directive contains a scope rule, which holds an inherent conflict of laws implication that national acquired rights provisions will apply whenever the undertaking *to be transferred* is situated within the territory of a Member State.[945] Leaving aside whether this rule should (naturally) translate to the Member States limiting the application of their national acquired rights provisions to the undertaking to be transferred being situated within their distinct territory,[946] the national transposition measures should undoubtedly ensure the application of the laws of a Member State whenever the undertaking to be transferred is situated within the territory of the European Union. Where national implementation measures or judiciary fail to do so, a conflict with Community law, i.e. Article 1(2) of the Acquired Rights Directive, arises.[947] This failure to properly implement the Directive may be remedied first by legislative action and second by directive-compliant interpretation. In the *Amerikanische Piloten* case the *BAG* failed to utilise the second remedy, which wrongfully resulted in the application of the laws of the State of New York where it concerned the issue of transfers of undertakings. However, in determining whether the provisions stemming from the Acquired Rights Directive are to be classified as overriding mandatory rules the *BAG* correctly decided that the aim of the provision(s) is determinative. Since the acquired rights provisions are primarily intended to protect the interests of the individual employee,[948] the conclusion that the German national acquired rights provisions do not amount to overriding mandatory provisions is not in itself erroneous. This however leaves us with the curious situation that, although not strictly befalling the definition of overriding mandatory rules, the provisions of the Acquired Rights Directive and their national counterparts do appear to require such application in

[945] *Cf.* Wimmer 1995, p. 209; *Cf.* Van Hoek, Arbeidsovereenkomst, artikel 7 EVO, note 6.2 (2005).

[946] *Cf.* The implementation in the United Kingdom; A.A.H. van Hoek, Arbeidsovereenkomst, artikel 7 EVO, note. 6.2 (2005), who believes that the Dutch implementation provisions in Article 7:662 BW et seq. qualify as overriding mandatory rules and require application whenever the undertaking or part of an undertaking to be transferred is situated within Dutch territory.

[947] Krebber 1998, p. 140.

[948] Surely the provisions do encompass the protection of certain collective interests that go beyond those of the individual employee. These collective interest and the internal market considerations underlying the Acquired Rights Directive however do not outweigh the protection of the individual employee that the directive seeks to ensure.

situations such as the one before the German courts. After all, the scope rule of Article 1(2) requires the application of Member State acquired rights provisions whenever the undertaking to be transferred is situated within European territory.

In any event, where, upon the transfer of a European based undertaking, application of Member State acquired rights provisions is not guaranteed, a correction of the result of the conflict of laws reference should come to pass. Such a correction could be found in the doctrine and mechanism of overriding mandatory provisions. If the national provisions implementing the Acquired Rights Directive are classified as overriding mandatory provisions, they will require application regardless of the *lex causae.* As such, if the *lex causae* points towards the laws of a state that does not secure the transfer of employment relationships upon a transfer of undertaking, the overriding mandatory nature of the acquired rights provisions of the forum will secure that a transfer of undertaking occurs. In order to establish whether the national provisions implementing the Acquired Rights Directive may be considered overriding mandatory provisions it is interesting to examine whether the scope rule contained in Article 1(2) of the Acquired Rights Directive holds any significance for the conflict of laws. After all, the existence of a scope rule delineating the (territorial) scope of application of certain provisions may form an indication of the overriding mandatory nature of these provisions.[949]

*6.2.2. Article 1(2) Acquired Rights Directive*

What is apparent from the preceding paragraphs is that the Acquired Rights Directive is not equipped with a clear and uniform conflict of laws provision that irrevocably determines the applicable law to a cross-border transfer of undertaking. Thus where it is apparent that the Acquired Rights Directive remains wanting of any express conflict of law provisions, this paragraph seeks to examine whether the directive encompasses any implicit conflict of law provisions or implications. Surely, if it is established that the Acquired Rights Directive itself determines when it and its national counterparts, apply, the need to determine the applicable law to a transfer of undertaking by any other means disappears. A conflict of laws provision or implication

[949] Basedow 2015, p. 244; Kuipers 2012, p. 71-72; Boele-Woelki & van Iterson 2010, p. 9.

may, possibly, be found in the scope rule confined in Article 1(2) of the Acquired Rights Directive, which causes the Directive to 'apply where and in so far as the undertaking, business or part of the undertaking or business to be transferred is situated within the territorial scope of the Treaty'.[950] This provision, which encompasses the territorial scope of the directive, ensures that, upon a transfer of undertaking, the rights of employees are safeguarded whenever the undertaking to be transferred is situated within the EU territory of the Member States. In other words, the provision ensures that the directive applies whenever the business to be transferred is located within EU territory prior to its transfer. Under the conflict of laws, scope rules, i.e. rules determining the scope of application of a specific law, may be an indicator that the law in question is to be considered an overriding mandatory provision. Overriding mandatory provisions are frequently accompanied by scope rules, which unilaterally determine their scope of application [951] Scope rules however, may also be defined as rules delineating the scope of a specific rule of law without overriding the law that would otherwise apply to the legal relationship in question. As such, scope rules may be unilateral conflict of laws provisions or merely delineate the geographic application of certain legal provisions.

*6.2.2.1 Methodology*

Before discussing the nature of Article 1(2) of the Acquired Rights Directive and its effects on the conflict of laws it is worth briefly examining a certain part of the conflict of laws methodology. Surely, under the conflict of laws a large variety of methodological approaches can be distinguished. The discussion in this subparagraph is limited to the methodological approaches of unilateralism and multilateralism, the dichotomy existing between them and their impact on cross-border transfers of undertakings. The differences existing between the theories of unilateralism and multilateralism are rooted

[950] The term Treaty refers to the consolidated version of the Treaty on the Functioning of the European Union, *OJ* 2010, C 83/47. At the time of its adoption the term Treaty in Art. 1(2) Directive 2001/23/EC referred to the Treaty establishing the European Community (consolidated version), *OJ* 2006 C, 321E.

[951] Overriding mandatory provisions are frequently accompanies by scope rules, which unilaterally determine their scope of application *Cf.* Basedow 2015, p. 477 *et seq*; Van Bochove & Kramer 2010, p. 12; Van Hoek 2000, p. 455; Strikwerda 2015, p. 158.

in the basis for and nature of the conflict of laws.[952] The theory of unilateralism inextricably finds its basis in state sovereignty and counts as the earliest surviving view on private international law. In the unilateralist view the legal provision itself forms the starting point for the conflict of laws consideration. What is determined is whether and under which conditions a certain legal provision is to be applied. In the traditional *Statutist* view, the birth of the unilateralist approach being attributed to the Italian *Statutists* of the 12th century,[953] the territorial scope of national law forms a key consideration. Building on this traditional unilateralist approach twentieth century scholar *Brainerd Currie* developed the so-called 'governmental interest analysis', in which particular importance is attributed to legislative intentions and the purpose of substantive law.[954] In this view the application of a particular legal provision is dependent on whether it, according to the underlying state interests, deserves application. Thus, according to the (modern) unilateralist theory each legal provision, bearing in mind its nature and purpose, delineates its own scope. Under the theory of multilateralism, derived from the writings of 19th century German scholar *Friedrich Carl von Savigny*,[955] the ideological father of the multilateral approach to private international law, the legal relationship forms the focal point of the conflict of laws consideration. Instead of unilaterally defining the scope of national law without any regard for the application of foreign law, the aim of this approach is to find the seat of the legal relationship, i.e. allocating the legal relationship in question to a particular legal system in order to escape incongruent treatment of the same legal question by the courts of different states.[956] In this, a neutral connecting factor is to bring the legal relationship home and subject it to the legal system of its natural seat.[957] In his development of the classic approach to the conflict of laws *Von Savigny* managed to find a neutral and objective standard of measure, resulting in

[952] *Cf.* Rühl 2012.
[953] *Cf.* Strikwerda 2012, p. 15; Rühl 2006, p. 25; Rühl 2011, p. 288.
[954] Currie 1990; Symeonides 2005, p. 4..
[955] Von Savigny 1849; *Friedrich Carl von Savigny*, rejecting the existing unilateralist views, developed a new approach to the conflict of laws.
[956] Von Savigny 1849, p. 129; Juenger, 1992, p. 138.
[957] To this end *von Savigny* distinguished several classes of legal relationships, each having their own 'seat'. Each legal relationship is subject to the legal class to which it according to *'seiner eigenthümlichen Natur nach angehört oder unterworfen ist'*; Von Savigny 1849, p. 28.

uniform conflict of laws rules unbound by substantive justice.[958] The use of this uniform multilateral approach to the conflict of laws would ultimately result in so-called *Entscheidungseinklang* (decisional harmony) which is considered the aim of private international law.[959] Upon achieving this ideal, each legal question is answered equally, irrespective of the place of assertion, i.e. the location of the court entrusted with answering this question. Thus, according to *Von Savigny,* the aim of the conflict of laws is *'daß die Rechtsverhältnissen in Fällen der Collision der Gesetze, dieselbe Beurtheilung zu erwarten haben, ohne Unterschied, ob in diesem oder jenem Staate das Urtheil gesprochen werde.'*[960] Even though this aim is, at present, still a remote ideal, especially on a global scale, the multilateral approach unmistakably forms the heart of modern day European private international law. Still, unilateralism has not completely disappeared from the European private international law plane. First, overriding mandatory rules may unilaterally bypass the result of the multilateral conflict of laws reference.[961] These types of rules were already distinguished by *Von Savigny,* who believed that certain rules of a strictly positive and mandatory nature, carrying vital public interests cannot be set aside by foreign law.[962] Second, unilateralism is advancing by the inclusion of a definition of the scope of, especially secondary, European Union law. Secondary European Union law, such as the Acquired Rights Directive, is increasingly equipped with provisions, either expressly or implicitly, defining the spatial or territorial scope of these instruments.[963] Thus, although the theories of multilateralism and unilateralism from a dogmatic perspective appear mutually exclusive, they seem to (ill-fittingly) coexist within modern European private international law.

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[958] Thoms 1996, p. 70.

[959] Von Savigny 1849, p. 27, 129; Reaching international decisional harmony, although presently a remote ideal, is still considered the ultimate purpose of private international law. See *e.g.* Goldt 2002, p. 116; Bernitt 2010, p. 36; Baarsma 2011, p. 95; Sonnentag 2001, p. 116 *et seq.*

[960] Von Savigny 1849, p. 26-27.

[961] Rühl 2011, p. 290.

[962] Von Savigny 1849, p. 33 *et seq.*: *‚Gesetze von streng positiver, zwingender Natur, die eben wegen dieser Natur zu jener freien Behandlung, unabhängig von den Gränzen verschiedener Staaten, nicht geeignet sind.' (p.33)*; *Cf.* Nygh 1999, p. 199; Kuipers 2012, p. 56; Van Bochove 2014, p. 148.

[963] Francq 2006, p. 339 *et seq.*; Rühl, 2012, p. 7; Kuipers 2012, p. 180.

The Acquired Rights Directive, a secondary European Union law instrument, in Article 1(2) holds an express scope rule stating that the 'directive shall apply where and in so far as the undertaking, business or part of the undertaking or business to be transferred is situated within the territorial scope of the Treaty.' As such, the directive applies whenever the undertaking *to be transferred* is situated within EU territory.[964] Yet questions arise as to the interpretation of this specific scope rule and its interaction with the settled multilateral approach to the conflict of laws. Does the scope rule contained in the Acquired Rights Directive have direct conflict of laws implications? How does it translate to the application of national acquired rights provisions as the directive is not directly applicable to individual actors within the Member States? Does the scope rule take precedence over existing (multilateral) rules of the conflict of laws? Does it qualify as a provision of Community law laying down conflict of law rules relating to contractual obligations within the meaning of Article 23 of the Rome I Regulation?[965] Answers to these questions are vital to determining the law that applies to a (cross-border) transfer of undertaking. These questions therefore play a central role in the present paragraph.

*6.2.2.2 Overriding mandatory provisions in European directives*

The questions posed in the preceding (sub)paragraph are essential to determining the law that applies to a cross-border transfer of undertaking. Since the Acquired Rights Directive finds its origin in European law, European law and the principles confined therein may be best suited to put an end to these questions and uniformly determine the law that governs a cross-border transfer of undertaking. Unfortunately, the questions mentioned above are not easily answered. The principles of primacy and territoriality existing in European law are designed to solve conflicts between national laws and European Union law and determine the scope of application of European law. These principles however, do not fully answer questions of conflicting national provisions transposing European directives; of the interrelationship between European directives and national conflict of laws

[964] *Cf.* Chapter 2.

[965] Rühl and Francq pose similar questions. Rühl states that these will have to be answered in coming years: Rühl 2012, p. 8; Francq 2006, p. 337 *et seq.*

mechanisms and of the interrelationship between European directives and European conflict of laws instruments. [966]

By reason of the principle of territoriality all European legislation is to be applied within EU territory. In this sense European legislation applies to European territory to the same extent as national legislation applies throughout national territory. In discussing the problems arising in relation to cross-border transfers of undertaking the principle of territoriality is however insignificant as it does not solve the issue of which national acquired rights provisions are to apply in any given case. Still, in this context, one could ask whether Article 1(2) of the Acquired Rights Directive, which references the territorial scope of the Treaty, qualifies as a scope rule in the traditional conflict of laws sense or whether it merely constitutes a reiteration of the territorial scope of European legislation.

Under the principle of primacy, European law takes precedence over national law in case of a conflict existing between the two. This principle, which stems from the case law of the ECJ,[967] has not been explicitly embodied in the European Treaties, i.e. the TEU and the TFEU. It follows from the non-binding declaration[968] annexed to the Treaty of Lisbon[969] that 'in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States (...).'[970] The case law of the ECJ reiterates the autonomous character of European law and the Community legal order. Since the establishment of the primacy of European law over national law in the 1964 landmark case of *Costa/ENEL*, it has generally been considered that Community law, in terms of hierarchy, takes precedence over national law, which includes private international law.[971] Surely where it concerns European regulations, which by their very

[966] Francq 2006 p. 337 *et seq.*
[967] Case 6/64 *Costa v ENEL* [1964] ECLI:EU:C:1964:66
[968] Declaration concerning primacy (no. 17) *OJ* [2007] C 306/256; The content of this declaration was originally reflected in Art. I-6 of the rejected EU Constitution.
[969] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community *OJ* [2007] C 306/1.
[970] Declaration concerning primacy (no. 17) *OJ* [2007] C 306/256.
[971] Case 6/64 *Costa v ENEL* [1964] ECLI:EU:C:1964:66; Heymann 2011 p. 559.

nature of direct application intervene in the legal systems of the Member States, such hierarchy is easily established. Directives however require implementation into national law.[972] In addition, since directives, such as the Acquired Rights Directive, are not equipped with horizontal direct effect, private individuals are unable to rely directly on the provisions of the directive against other individuals.[973] Their rights have to be ensured via a proper transposal of directives into national law. By transposing these directives into national law, they essentially become part of the existing body of domestic law, appearing no higher in hierarchy then any provision originating from the national legislator.[974] Thus, the provisions stemming from a European directive and its national implementation provisions do not naturally possess overriding mandatory effect.[975] In order to be classified as overriding mandatory provisions, provisions stemming from European directives, not unlike any other provision of domestic law, must inhabit a certain collective or public interest in the sense that these provisions intervene in private legal relationships for the protection of public interests. To this end, *Köhler* argues that internal market considerations alone will not constitute a sufficient public interest, since all European legislation to some extent is aimed at a proper functioning of the internal market.[976] Touching upon the example of the Acquired Rights Directive, the question may be asked whether the provisions of the directive inhabit sufficient public interests to justify the classification of these provisions as overriding mandatory. The Acquired Rights Directive effectuates a harmonisation of the national law of the Member States. This type of harmonisation is generally aimed at eliminating obstacles to the internal market. In addition, the Acquired Rights Directive was originally adopted to counteract the

[972] Per Article 288 TFEU directives are binding upon each Member State to which they are addressed; Article 14 Directive 2001/23/EC. The Member States of the EU and the EEA are required to transpose the Directive into their national law.

[973] Via the doctrine of direct effect private individuals are allowed to invoke the provisions of a directive against a State or a State body, provided that the provisions of the directive are unconditional and sufficiently precise and the state has failed to implement the directive in national law by the end of the period prescribed or where it fails to implement the directive correctly: Case 152/84 *M. H. Marshall v Southampton and South-West Hampshire Area Health Authority* [1986] ECR 723, ECLI:EU:C:1986:84.

[974] Köhler 2013, p. 149; Kuckein 2008, p. 61.

[975] Kuckein 2008, p. 61.

[976] Köhler 2013, p. 149-150.

negative employment effects that would inevitably arise from the creation of a Common Market or internal market.[977] As such, the directive seeks to protect both the individual and collective interests of the affected employees. Thus, the overall purpose of the Acquired Rights Directive seems to hold both individual and communal interests.[978]To my mind however, a vision that strokes with that of the *BAG* in the *Amerikanische Piloten* case[979], the provisions stemming from the Acquired Rights Directive are, although party rooted in internal market considerations, primarily intended to protect the employees that are individually affected by a transfer of undertaking. As such, even though the directive ensures the transfer of certain collective rights and obligations[980], it does so in the interests of the affected employees. Since, there still appears to be some debate on this issue[981] the ECJ could, in principle, elucidate the overriding mandatory position of the Acquired Rights Directive and its national counterparts by clearly establishing or rejecting its supra-individual purpose, as it did with the Commercial Agents Directive in the case of *Ingmar*. [982]

*6.2.2.3 Ingmar v Eaton*

The discussion of the problems arising in connection with overriding mandatory rules and European directives is inextricably linked to the judgment of the European Court of Justice in the case of *Ingmar GB Ltd v Eaton Leonard Technologies Inc.*[983] This judgment, which has been widely discussed throughout the legal community,[984] is generally considered to give

[977] De Witte 2015, p. 99; Wyatt 2005, p. 136.
[978] *Cf.* Niksova 2014, p. 88.
[979] BAG 29 October 1992 – 2 AZR 267/92.
[980] Such as the observation ofterms and conditions stemming from collective agreements and the preservation of status and function of employee representatives.
[981] Francq 2007; Van Bochove 2014; Rühl 2012; Rühl 2011; Kuipers & Vlek 2014; Roth 2000, p. 375-376.
[982] Case C-381/98 *Ingmar GB Ltd v Eaton Leonard Technologies Inc* [2000] *ECR* I-09305, ECLI:EU:C:2000:605; Kuckein 2008, p. 61.
[983] Case C-381/98 *Ingmar GB Ltd v Eaton Leonard Technologies Inc* [2000] *ECR* I-09305, ECLI:EU:C:2000:605.
[984] *Cf.* Jayme 2000, p. 454-455; Jayme 2001, p. 190; Idot, 2001, p. 112-120: Freitag & Leible 2001, p. 287-295; Staudinger 2001, p. 1974 *et seq*; Reichold 2008, p. 50; Martiny 2001, p. 308, p. 330; Van Hoek, p. 195-197; Verhagen, 2001, p. 27–39; Verhagen 2002, p. 135-154.

rise to more questions than it answers.[985] More so, the decision has provided new ammunition to those believing that overriding mandatory rules should encompass legal provisions involving weaker party protection.[986] In *Ingmar* the ECJ addressed the scope of a European directive and its effects on the conflict of laws. In doing so, the court held that Member State legislation implementing Articles 17 and 18 of the Commercial Agents Directive,[987] which guarantee certain rights to commercial agents after termination of agency contracts, requires application in situations where the commercial agent carried on his activity in a Member State for a non-European based principal and the contract contains a choice of law for the laws of a non-Member State. In essence, the provisions of the Commercial Agents Directive require application whenever the agent has carried on his activity in a Member State, irrespective of the location of the principal or the law governing the contract. The reasons underlying this apparent overriding effect of the Commercial Agents Directive can be found in paragraphs 24 and 25 of the judgment:

> ’24. The purpose of the regime established in Articles 17 to 19 of the Directive is thus to protect, for all commercial agents, freedom of establishment and the operation of undistorted competition in the internal market. Those provisions must therefore be observed throughout the Community if those Treaty objectives are to be attained.
>
> 25. It must therefore be held that it is essential for the Community legal order that a principal established in a non-member country, whose commercial agent carries on his activity within the Community, cannot evade those provisions by the simple expedient of a choice-of-law clause. The purpose served by the provisions in question requires that they be applied where the situation is closely connected with the Community, in particular where the commercial agent carries on his

[985] Case C-381/98 *Ingmar GB Ltd v Eaton Leonard Technologies Inc* [2000] *ECR* I-09305, Jur. 2000, I-9305 opinion Th. De Boer, note. 1; Beukler 2005, p. 37; Martiny 2001, p. 308 *et seq*.

[986] Beukler Siebeck 2005, p. 36-37; Jayme 2001, p. 190 *et seq.*; Jayme & Kohler 2000, p. 454; Staudiger 2001, p. 1974 *et seq.*

[987] Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents *OJ* [1986] L 382, p. 17.

> activity in the territory of a Member State, irrespective of the law by which the parties intended the contract to be governed.'[988]

The judgment provides that Articles 17 to 19 of the Commercial Agents Directive are aimed at protecting the commercial agent after the termination of his contract[989], however, the overriding effect of the provisions stemming from the directive appears to additionally find its basis in broader policy objectives, i.e. the freedom of establishment and the operation of undistorted competition in the internal market.[990] The mere protection of private interests therefore appears insufficient for the classification of provisions stemming from a European directive as overriding mandatory.[991] The ECJ bases the overriding effect of provisions stemming from European directives, *in casu* Articles 17 to 19 of the Commercial Agents Directive, on the importance of the mandatory nature of rules aimed at achieving the objectives of the European Community. It appears that these provisions of Community law by themselves may withstand a choice of law.[992] Thus the judgment gives rise to the notion that provisions stemming from European directives aimed at protecting private individuals, whenever a situation is closely connected with the Community, may (partly) impede party autonomy. Although the Commercial Agents Directive is aimed at the protection of the commercial agent and finds its basis in internal market considerations the reasoning underlying the judgment in *Ingmar* may likely be extended to directives that

[988] Case C-381/98 *Ingmar GB Ltd v Eaton Leonard Technologies Inc* [2000] *ECR* I-09305. ECLI:EU:C:2000:605, para. 24 and 25.
[989] Case C-381/98 *Ingmar GB Ltd v Eaton Leonard Technologies Inc* [2000] *ECR* I-09305, ECLI:EU:C:2000:605, para. 21.
[990] Case C-381/98 *Ingmar GB Ltd v Eaton Leonard Technologies Inc* [2000] *ECR* I-09305, ECLI:EU:C:2000:605, para. 25.
[991] *Cf.* Renner 2015, para. 20; Also see: Van Hoek 2001, p. 196 who believes that internal market considerations in the aims of European Directives cannot serve to provide overriding effect to the provisions of these directives since these considerations exhibit the distribution of power between the Member States and the EU rather then having an effect on the conflict of laws. More so, all directives based on Article 95 of the EC Treaty (partly) serve internal market objectives; it is desirable nor necessary to attribute overriding effect to all of these directives.
[992] Case C-381/98 *Ingmar GB Ltd v Eaton Leonard Technologies Inc* [2000] *ECR* I-09305, Jur. 2000, I-9305 opinion Th. De Boer note 2.

are intended to protect other Community objectives.[993] The decision in *Ingmar* proves that harmonizsed private law, such as the national provisions implementing the Commercial Agents Directive, which according to prior Member State judgments was merely considered internally mandatory,[994] may be considered overriding mandatory law.[995] In this sense, mandatory provisions of Community law based in European directives may not just bypass the choice of law made by the parties, but are also likely to be able to bypass the law designated by the objective conflict of laws reference. The reasoning in *Ingmar* especially applies to situations where the objective conflict of laws reference points towards the laws of a non-Member State. In these cases, the aim and purpose of European directives combined with a close connection to the European Community[996] may warrant the mandatory application of European law, overriding the laws of the non-Member State.[997] In relation to non-Member States, the provisions stemming from European directives may therefore be classified as overriding mandatory provisions with an independent international and territorial scope, derived from the aim and purpose of these directives.[998] In other words, in giving full effect to the considerations of the judgment in *Ingmar,* the provisions stemming from European directives may bypass the *lex causae*, irrespective of whether the applicable law finds its basis in party autonomy or the

[993] Renner 2015, para. 19-20; Case C-381/98 *Ingmar GB Ltd v Eaton Leonard Technologies Inc* [2000] *ECR* I-09305*,* ECLI:EU:C:2000:605, opinion Th. De Boer note 2.

[994] Cass. Com., 28 November 2000, pourvoi n° 98-11.335, Bull. 2000, IV, n° 183: '*Mais attendu que la loi du 25 juin 1991, codifiée dans les articles L. 134-1 et suivants du Code de commerce, loi protectrice d'ordre public interne, applicable à tous les contrats en cours à la date du 1er janvier 1994, n'est pas une loi de police applicable dans l'ordre international'*; Rb. Arnhem, 10 July1991, *NIPR* 1992, 100: *'Wél kan deze Richtlijn worden betrokken bij het onderzoek - dat hier aan de orde is - van de vraag of de klantenvergoedingsregel een bijzonder belang dient van zodanige aard dat die regel als voorrangsregel heeft te gelden. Uit de Richtlijn is af te leiden dat dit niet het geval is. Weliswaar verlangt art. 17 jo. art. 19 van de Richtlijn dat in het recht van de Lidstaten bij dwingende bepaling aan de handelsagent recht op een vergoeding na beëindiging van de agentuurovereenkomst wordt verleend, maar de Lidstaten kunnen daarbij in plaats van klantenvergoeding ook kiezen voor het verlenen van recht op herstel van nadeel. Bovendien verlangt de Richtlijn niet dat de desbetreffende dwingende bepaling in een internationaal geval voorrang heeft.'*

[995] Hauser 2012, p. 11.

[996] Nowadays the European Union.

[997] Van Hoek 2001, p. 196.

[998] Van Hoek, p. 196.

objective conflict of laws reference, provided that the case is sufficiently connected with the European Community.[999] The fact that provisions stemming from European law may take precedence over national law, including private international law, is nothing new. It is commonly believed that scope rules contained in European directives may be construed as uniform provisions of private international law allowing them to bypass the commonly applicable multilateral conflict of laws rules whether from national or Community descend.[1000] This reasoning equally applies to the Rome I Regulation, which in Article 23 makes provision for the priority of provisions of Community law laying down specific conflict of laws rules relating to contractual obligations. However, what is interesting about the case of *Ingmar* is that the Commercial Agents Directive itself is absent of any provisions regarding its international or territorial scope.[1001] As such, the application of the directive and its national counterparts may either be decided on the basis of the private international law of the forum or inferred from the provisions of the directive. In both cases, either by application of overriding mandatory provision in the sense of Article 9 of the Rome I Regulation or by reason of direct application via the distinct scope of application inferred from the directive itself, it is the aim of the directive that determines whether overriding effect is to be attributed to its provisions and its national corollaries.[1002] Since the purpose of the Commercial Agents Directive lies both in the protection of the commercial agent as a weaker party and in the protection of the freedom of establishment and the operation of undistorted competition in the internal market it is questioned whether the provisions of the Commercial Agents Directive, pursuant to the judgment in *Ingmar,* should be considered internationally overriding in the sense that

[999] Kania 2012, p. 183; Case C-381/98 *Ingmar GB Ltd v Eaton Leonard Technologies Inc* [2000] *ECR* I-09305*,* ECLI:EU:C:2000:605, opinion Th. De Boer, note 2-3; earlier: Joustra 1999, p. 669, 670.

[1000] Joustra 1999, p. 666; Case C-381/98 *Ingmar GB Ltd v Eaton Leonard Technologies Inc* [2000] *ECR* I-09305*,* ECLI:EU:C:2000:605, opinion Th. De Boer, note 3.

[1001] In addition, no reference was made to the provisions of the Rome Convention since, at the time of the judgment, the 'First Protocol on the interpretation of the 1980 Convention by the Court of Justice (consolidated version) / 1980 Rome Convention' *OJ* [1998] C 27/47-51 (*OJ* [2005] C334/20) had not yet entered into force. This protocol first became effective on 1 august 2004.

[1002] Case C-381/98 *Ingmar GB Ltd v Eaton Leonard Technologies Inc* [2000] *ECR* I-09305*,* ECLI:EU:C:2000:605, opinion Th. De Boer note 3.

their application is of such importance that the *lex causae* may be set aside, irrespective of whether the applicable law to the contract is established by reason of a choice of law or by reason of objective conflict of laws provisions applying in the absence of such choice, or whether they are merely mandatory in the sense that their application may not be set aside by a choice of law (for the laws of a non-Member State). Thus the question arises whether the overriding effect given to the provisions of the Commercial Agents Directive in *Ingmar* is to interpreted akin to the conflict of laws protection afforded to other weaker contractual parties such as consumers and employees.[1003]

The notion stemming from the judgment in *Ingmar* that mandatory rules contained in European directives may be considered internationally mandatory in relation to non-Member States whenever there is a sufficiently close connection with the European Community may blur the line between internally and internationally mandatory rules leaving *Ingmar* to serve as a gateway for the extension of this reasoning to all mandatory provisions stemming from European directives.[1004] On the other hand it may be derived from *Ingmar* that overriding effect is only attributed to secondary European Union law if the provisions stemming from directives according to their purpose and aim require application irrespective of the choice of law made by the parties. A strict application of these requirements, thwarting the

[1003] For these types of contractual parties there already exists a limited choice of law under the Rome I Regulation.

[1004] Schwarz 2002, p. 45 *et seq*.; Kuipers 2012, p. 578-579; Max Planck Institute for Foreign Private and Private International Law, 'Comments on the European Commission's Greenpaper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a community instrument and its modernization', p. 73-74, available online at:
<http://ec.europa.eu/justice/news/consulting_public/rome_i/contributions/max_planck_institute_foreign_private_international_law_en.pdf>: the Max Planck Institute proposes to limit the reasoning of the judgment in *Ingmar* to the Commercial Agents Directive. More so, it feels that, since the main reasons underlying the ruling in *Ingmar*, in their belief, were in the interests of the commercial agent who required protection against a (possibly) stronger principal, commercial agents be given the same weaker party protection as employees and consumers by shaping the conflict of laws reference in their favour and allowing for party autonomy only insofar as a choice of law would not deprive the agent of the protection afforded to him by the laws in force in the state of his place of business.

continued precedence of the Community process of harmonisation, will thus prevent the erosion of party autonomy.[1005]

*6.2.2.4 Unamar*

In its recent decision in *Unamar*[1006] the ECJ put the ruling in *Ingmar* in perspective with regard to intra-EU relationships. In doing so, it provided clarification to the concept of overriding mandatory provisions existing under Article 7 of the Rome Convention. In this case, brought before the Belgian courts[1007], Belgian commercial agent *Unamar* sought application of the Belgian law transposing the Commercial Agents Directive against Bulgarian principal *NMB*, despite the existence of a choice of law for Bulgarian law and an arbitration clause in favour of the Chamber of Commerce and Industry in Sofia, Bulgaria. Even though both Bulgaria and Belgium had properly transposed the provisions of the directive into their national legislation, the Belgian provisions went beyond the protection afforded to the commercial agent by the directive by offering a higher level of protection and operating a wider scope. In implementing the provisions of the Commercial Agents Directive Belgium had opted to introduce provisions that were more favourable to the commercial agent than the minimum protection afforded by the directive. Accordingly, Article 27 of the Belgian *Wet betreffende de handelsagentuurovereenkomst*[1008] (Law on commercial agency contracts) subjects any activity of a commercial agent whose principal place of business is in Belgium to Belgian law and the jurisdiction of the Belgian courts, whereas Articles 18, 20 and 21 of said law extend the possible compensation awarded to commercial agents upon the termination of the agency contract. The question thus arose as to whether the Belgian implementation provisions, which were of a mandatory nature, could be awarded overriding mandatory effect, to the extent that they were able to bypass the (properly implemented) laws of another Member State. In *Ingmar*

[1005] Staudinger 2001, p. 1976; Opinion Advocate General Léger *Ingmar GB Ltd v Eaton Leonard Technologies In* Case C-381/98 [2000] ECLI:EU:C:2000:230, para. 72 *et seq.*

[1006] Case C-184/12 *Unamar* [2013] ECLI:EU:C:2013:663.

[1007] In this case the *Rechtbank van Koophandel* in Antwerp; upon appeal the *Hof van Cassatie* decided to ask the ECJ for a preliminary ruling.

[1008] *13 april 1995. Wet betreffende de handelsagentuurovereenkomst (F: 13 avril 1995 - Loi relative au contrat d'agence commerciale*), published *Justice* 2 July 1995 no. 1995009425, p. 15621.

the court had already ruled that overriding mandatory effect was to be awarded to the provisions of the Commercial Agents Directive and its national counterparts with respect to non-Member States. The question in *Unamar* was whether this reasoning could be extended to the mandatory rules of the *lex fori* in situations where the parties had chosen the laws of a Member State to govern their contract. One of the key considerations for affording overriding mandatory effect to the provisions of the Commercial Agents Directive in *Ingmar* was that through a choice of law for the laws of a non-Member State the parties in *Ingmar* would otherwise be able to evade the mandatory provisions of the directive. This risk of non-application of the provisions of the directive did not exist in *Unamar* since the parties had opted for the application of Bulgarian law. More so, it remained uncontested that Bulgaria had properly transposed the provisions of the directive into its national law. In light of this the question arises of the weight to be attributed to the existing minimum harmonisation and the proper implementation of the Commercial Agents Directive in the law chosen by the parties. The answer to this question lies in the application of Article 7 Rome Convention (and Article 9 Rome I Regulation).[1009] On the basis of these articles it is for the national court to decide whether a provision qualifies as overriding mandatory. In this national assessment it must first be ensured that the choice freely made by the parties as regards the law applicable to their contractual relationship is respected in order to give full effect to the principle of the freedom of contract.[1010] As party autonomy remains the cornerstone of the conflict of laws instruments for contractual relationships, the provisions on (overriding) mandatory rules are subject to strict interpretation.[1011] In assessing whether a provision requires overriding mandatory effect the national court must take account of the general structure and circumstances under which the law was adopted in order to determine whether it is of such importance that the Member State concerned finds its application to be essential. Such essential interest may exist in cases where the national implementation provisions of the forum state offer greater protection to a certain group of individuals, such as commercial agents, due

[1009] Case C-184/12 *Unamar* [2013] ECLI:EU:C:2013:663, para. 41; Kuipers & Vlek 2014, p. 200.
[1010] Case C-184/12 *Unamar* [2013] ECLI:EU:C:2013:663, para. 49.
[1011] Case C-184/12 *Unamar* [2013] ECLI:EU:C:2013:663, para. 49.

to the interest which the forum state attributes to that category of individuals.[1012] In other words, according to the ruling in *Unamar* the Belgian implementation provisions of the Commercial Agents Directive may have overriding mandatory effect, even if these provisions go beyond the minimum protection afforded by the directive. However, in assessing whether the provisions possess overriding mandatory effect the national court must, according to the ECJ, in order not to compromise the harmonizing effect of European directives, take account of the precedence of the *lex fori* over the laws of another Member State that has properly transposed the directive. One would assume that such a condition is satisfied if the national provisions in question are considered crucial for the safeguarding of a Member State's public interests.[1013]

*6.2.2.5 Effects on the Acquired Rights Directive*

The *Ingmar* decision, followed by the subsequent ruling of the ECJ in *Unamar*, has outlined that provisions stemming from European directives may be classified as overriding mandatory provisions within the meaning of Article 9 of the Rome I Regulation if they serve the overriding interests of the European Union, for example if they are vital to the proper functioning of the internal market.[1014] In this sense, the national provisions transposing a European directive may be classified and applied as overriding mandatory provisions if such application is imperative to fulfilling the aims of the directive.[1015] Do the decisions in *Ingmar* and *Unamar* hold any significance for the Acquired Rights Directive? In answering this question, it should be noted that there exists several important differences between the Acquired Rights Directive and the Commercial Agents Directive, which was the directive under discussion in *Ingmar* and *Unamar.* In seeking connection to the individual contract of employment the applicable law to a transfer of

[1012] Case C-184/12 *Unamar* [2013] ECLI:EU:C:2013:663, para. 50.

[1013] Under Article 9(1) of the Rome I Regulation overriding mandatory provisions are defined as 'provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.'

[1014] Freitag 2009, p. 109, p. 116; Kania 2012, p. 180. This reasoning only applies to provisions stemming directly from the directive and does not extent to, as is clear from the case of *Unamar*, national provisions extending the protection awarded by European directives.

[1015] Kania 2012, p. 181.

undertaking and its effects is generally determined on the basis of Article 8 of the Rome I Regulation.[1016] This special conflict of laws provision for individual employment contracts not only limits the choice of law to be made by the parties by reason of the preferential law approach enshrined in Article 8(1), the conflict of laws reference is also shaped in such a way as to protect the weaker party, i.e. the employee. Similar provisions exist for consumers and insurance policy holders in Articles 6 and 7 of the Rome I Regulation. A provision affording special protection to commercial agents however does not exist within the Rome regime. If the overriding effect given to the provisions of the Commercial Agents Directive in *Ingmar* is to be interpreted akin to the conflict of laws protection afforded to other weaker contractual parties such as consumers and employees, the reasoning in *Ingmar* holds no significance for the Acquired Rights Directive. After all, such protection is already awarded to the affected employees if the issue of transfers of undertakings is connected to the individual employment contract. Indeed, for the individual employment contract a specific provision aimed at protecting the employee under the conflict of laws already exists. In addition, in relation to the Acquired Rights Directive, the idea stemming from the judgment in *Ingmar* that mandatory rules contained in European directives may be considered internationally mandatory in relation to non-Member States whenever there is a sufficiently close connection with the European Community,[1017] loses some of its significance by reason of the inclusion of Article 3(4) into the Rome I Regulation and the protection principle enclosed in Article 8.

The Rome I Regulation differs from the Rome Convention in the sense that Article 3(4) Rome I Regulation holds a new provision which provides a Community minimum standard ensuring that the applicability of the law of a non-Member State cannot result in the detriment of those protected by Community law. According to Article 3(4) 'where all other elements relevant to the situation at the time of the choice are located in one or more

[1016] Except in situations where the case at hand falls outside the temporal scope of the Rome I Regulation or where it concerns Denmark, which does not apply the Rome I Regulation.

[1017] Schwarz 2002, p. 45 *et seq*.; Kuipers, 2012 I, p. 578-579; Max Planck Institute for Foreign Private and Private International Law, Comments on the European Commission's Greenpaper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a community instrument and its modernization, p. 73-74.

Member States, the parties' choice of applicable law other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement.' Thus, where the parties have made a choice for the laws of a non-Member State that choice of law may be set aside in order to apply mandatory provisions of Community law. If there is a abundant link with the territory of a Member State, Community law may therefore be applied regardless of a *professio iuris* for the laws of a non-Member State. Where it concerns directives, which due to their nature cannot be applied to individual actors within the Member States, the *lex fori,* i.e. the national implementation provisions of the forum, requires application by reason of Article 3(4) Rome I Regulation. Article 3(4) seeks to prevent a fraudulent evasion of Community law,[1018] it does not, however, remedy the exact situation covered in *Ingmar* since it requires *all* other elements relevant to the situation to be located in one or more Member States.[1019] As such, the situation in *Ingmar* would fall outside the scope of this specific Article.

As stated above, the protection principle enshrined in Article 8 of the Rome I Regulation may also limit the effects of the decision in *Ingmar* with respect to the Acquired Rights Directive. Whereas the definition of overriding mandatory rules evidently includes provisions of public law with a direct effect on private legal relationships, the position of provisions that are primarily intended to protect the socially or economically disadvantaged is more undetermined.[1020] These provisions have traditionally been considered as overriding mandatory in nature if they are partly intended to protect certain communal interests.[1021] Yet, due to the advance of the protection principle under the conflict of laws this view has watered down significantly. For instance, it is assumed that Article 10:7 of the Dutch Civil Code, which deals with overriding mandatory provisions and was inspired by and based

[1018] COM(2005) 650 final, p. 5.
[1019] Harris 2009, p. 341; Martiny, MüKO BGB 2015, Art. 3 Rom I-VO, No. 98; Freitag 2009, p. 112.
[1020] *See inter alia:* Vonken 2012 (T&C Burgerlijk Wetboek, Art. 10:7 BW, note 4b; Van Hoek 2009, p. 79-81; Henckel 2012, p. 386; Kania 2012, p. 190-191.
[1021] Freitag 2009, p. 112; Kania 2012, p. 190-191; Th.M. de Boer opinion under *Hoge Raad* 12 September 1997, *NJ* 1998, 688; De Boer 2003, p. 466.

on Article 9 Rome I Regulation, does not cover provisions that are primarily intended to safeguard employees.[1022] As stated above in paragraph 6.1, due to the existence of the conflict of laws rules based on the protection principle overriding mandatory provisions of this category are left almost redundant, despite having a semi public law impact.[1023] Owing to the principle of protection the conflict of laws reference is shaped in such a way as to best protect the weaker party. For individual contracts of employment connection is primarily sought to the place of habitual employment.[1024] Given the inherent protective nature of employment law this connection ensures that the employee is protected by the laws and standards of the place where he habitually carries out his work.[1025] When the conflict of laws provisions selects the legal system that is best qualified to apply its employee protective provisions, the concomitant application of the protective provisions of other legal systems on the basis of the doctrine of overriding mandatory provisions appears superfluous. The doctrine of overriding mandatory provisions therefore seems exclusively reserved for provisions that intervene in private legal relationships for the protection of public interests.

In relation to the Acquired Rights Directive the question arises whether there is any need for a classification as overriding mandatory. Such a classification may have been a necessary requirement for the Commercial Agents Directive in *Ingmar,* however, unlike the Commercial Agents Directive, the Acquired Rights Directive is equipped with an explicit specific scope rule delineating its scope of application. As outlined numerous times above, Article 1(2) of the Acquired Rights Directive causes the directive to apply whenever the undertaking to be transferred is situated within the territory of the Treaty, i.e. the territory of any Member State. Due the existence of a scope rule the question arises as to the effects of this rule upon the conflict of

[1022] Henckel 2012, p. 386; De Boer 2003, p. 466; Strikwerda 2012, p. 67; *Cf.* Staatscommissie voor het internationaal privaatrecht, *Rapport aan de Minister van Justitie, Algemene Bepalingen Wet Internationaal Privaatrecht*, Den Haag 2002, p. 39.
[1023] Strikwerda 2012, p. 67; De Boer 2003, p. 466.
[1024] *Cf.* Art. 6 Rome Convention, Art. 8(2) Rome I Regulation.
[1025] Strikwerda 2012, p. 37; Van Lent 2000, p. 85. In addition, the preferential law approach enshrined in Article 8(1) limits the choice of law made by the parties by requiring the application of the objectively applicable law, generally the laws in force at the habitual place of employment, whenever this law provides the employee with more or better protection.

laws. Does the fact that the Acquired Rights Directive is equipped with an explicit scope rule, delineating its scope of application, mean that the provisions stemming from the directive, i.e. the national implementation provisions of the Member States, have an overriding effect on the *lex causae?*[1026] In this the situation may arise that, regardless of whether the acquired rights provisions are classified as overriding mandatory provisions, the provisions stemming from the directive will set aside the law that would otherwise govern the issue in question. Where it e.g. concerns scope rules of Dutch descend, the *Explanatory Memorandum* to the Dutch code on private international law (Book 10 BW) clarifies that insofar as a particular case falls within the ambit of a Dutch scope rule, the Dutch court is obliged to apply Dutch law, irrespective of the *lex causae*:

> *'Voor zover een bepaald geval binnen het toepassingsgebied van een Nederlandse scope rule valt, dient de rechter het Nederlandse recht toe te passen, ongeacht welk recht door de – anders toepasselijke – verwijzingsregel zou zijn aangewezen. Een onderzoek of de regel waarop de scope rule betrekking heeft als een voorrangsregel moet worden aangemerkt, is in een dergelijke situatie niet meer aan de orde, evenmin als uiteraard een onderzoek van de vraag tot welk resultaat toepassing van de verwijzingsregel zou hebben geleid.'*[1027]

Thus, under Dutch private international law, it appears that the dogmatic distinction of whether a provision is considered overriding mandatory or not is immaterial whenever a provision of national law is equipped with a specific scope rule. 'In such a situation a study of whether the rule to which the scope rule applies is to be classified as an overriding mandatory provision should not be performed, nor is a study into the question what the result of the conflict of laws reference should have been.'[1028] The provision of Article 10:7 BW is based on and inspired by Article 9 Rome I Regulation. As such, it is worth examining whether the same reasoning applies under the

[1026] *Cf.* Van Hoek 2010 (T&C Arbeidsrecht), Art. 9 Rome I Verordening, note 2c.
[1027] *Kamerstukken II* 2009/10, 32137 no. 3, p. 16 (MvT).
[1028] Free translation of: 'Een onderzoek of de regel waarop de scope rule betrekking heeft als een voorrangsregel moet worden aangemerkt, is in een dergelijke situatie niet meer aan de orde, evenmin als uiteraard een onderzoek van de vraag tot welk resultaat toepassing van de verwijzingsregel zou hebben geleid', *Kamerstukken II* 2009/10, 32137 no. 3, p. 16 (MvT).

Rome I Regulation. It is clear that the assumption that certain legal provisions may resist a choice of law by reason of their distinct scope of application also holds true under Article 9 Rome I Regulation.[1029] After all, Article 9(2) Rome I Regulation expressly states that 'nothing shall restrict the application of the overriding mandatory provisions of the forum.' As such, by reason of the distinct scope rule in the Acquired Rights Directive, national acquired rights provisions may require application whenever the undertaking to be transferred is situated within the territory of a Member State, irrespective of and without determination of the law that would otherwise govern the situation.[1030] Thus whereas the national implementation provisions of the forum may require direct application whenever the situation under consideration falls within their distinct scope, the (non-) classification of overriding mandatory provisions becomes more problematic where it concerns overriding mandatory provisions of states other than that of the forum. The application of the acquired rights provisions of third countries, i.e. provisions that are not part of the *lex fori*, cannot merely be effectuated by means of an accompanying scope rule. Since the courts of a Member State are generally not formally bound by foreign scope rules they will have to determine whether the foreign provision to which the scope rule applies is to be classified as an overriding mandatory rule. The court will have to determine whether the nature and purpose of the provision as well as the consequences of its (non-)application require the *lex causae* to be bypassed. Article 9(3) significantly curtails the application of mandatory rules other than those of the *lex fori* by stating that:

> 'effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful.'

The application of the overriding mandatory provisions of third countries is limited to the above wording. Beyond the scope of this provision, foreign

[1029] *Cf.* Van Hoek 2014, p. 470; Van Bochove 2014, p. 153.

[1030] Such classification still does not answers that question of which national acquired rights provisions are to be applied in situations involving a conflict of laws, see below.

overriding mandatory provisions should not be applied.[1031] Article 9(3) allows for the application of the overriding mandatory provisions of the country where the obligations out of the contract have to be or have been performed. In relation to a transfer of undertaking this place is likely to coincide with the place of habitual employment.[1032] In order to give full effect to the overriding mandatory provisions of the place of habitual employment, these provisions must render the performance of the contract unlawful. It is this condition that prevents the application of Article 9(3) and of overriding mandatory provisions of third states in relation to a transfer of undertaking. After all, the (national) acquired rights provisions bestow certain rights upon the affected employees and result in an *ex lege* transfer of the existing employment relationships to the transferee. They do not, however, render the transfer or employment contract unlawful.[1033] More so, the fact that Article 8(1) already provides for the application of the mandatory provisions of the objectively applicable law, generally that of the place of habitual employment, irrespective of whether these provisions render the employment contract unlawful, means that Article 9 is superfluous when it comes to provisions protecting the rights of individual employees.

The scope rule contained in Article 1(2) of the Acquired Rights Directive may give overriding effect to national acquired rights provisions. Since such overriding effect stems directly from the directive, it is limited to the minimum level of employment protection contained therein.[1034] Thus, where the Member States guarantee the minimum protection ensured by the directive, their laws may be applied as overriding mandatory provisions (of the *lex fori).* Assessing whether national acquired rights provisions have an overriding effect on the *lex causae* becomes more difficult where it concerns Member State provisions that exceed the minimum protection afforded by

[1031] Kania 2014, p. 179; Freitag 2009, p. 115.

[1032] To this end, especially when considering a transfer of undertaking that is coupled with a simultaneous or subsequent relocation of the undertaking the question becomes whether there may only be one place of performance. If so, then the place of performance is likely the newly established workplace, rendering the application of the acquired rights provisions in force at the former place of work ineffective. *Cf.* Kania 2014, p. 177.

[1033] Kania 2014, p. 177.

[1034] *Cf.* Case C-184/12 *Unamar* [2013] ECLI:EU:C:2013:663

the Acquired Rights Directive, either by an extension of the scope of the directive or by offering more protection, i.e. so-called gold plating, as these provisions will not be classified as rules of overriding mandatory effect of European descent. As is clear from the judgment in *Unamar* Member State provisions that exceed the minimum level of protection afforded by European directives, may be considered overriding mandatory provisions if their application is considered essential to the Member State from which they originate.[1035] Even so, in assessing whether national acquired rights provisions exceeding the protection afforded by the Acquired Rights Directive possess overriding mandatory effect the national court must, in order not to compromise the harmonizing effect of European directives, take account of the precedence of the *lex fori* over the laws of another Member State that has properly transposed the directive. All national legislation that surpasses the minimum standard cannot be assigned to European law but finds its basis in the national law of the Member States. Whereas this distinction between national acquired rights provisions stemming from EU law and those stemming from national law appears obvious from a theoretical perspective, the two are not as easily separated in practice. Regularly it will not be possible to separate the rules implementing certain minimum standards from those surpassing those standards as they will be part of a single legal provision. This is especially the case where, as with the Acquired Rights Directive, European directives not only provide a minimum standard of protection but also allow for partial harmonization in the sense that the Member States, in transposing the directive are given the option to apply certain rules of the directive.[1036] For example, by reason of Article 5(1) of the Acquired Rights Directive the *ex lege* transfer of the rights and obligations stemming from the employment contract to the transferee does not extend to the situation where the transferor is subject to insolvency proceedings. The Member States however, have the option of extending their

[1035] Case C-184/12 *Unamar* [2013] ECLI:EU:C:2013:663, para. 50.

[1036] The Member States may exceed by minimum protection offered by the directives by issuing three different categories of rules. First, the minimum protection of the directive may be extended by offering more and better protection, essentially gold-plating its provisions. Second, the scope of the directive may be extended, e.g. to different categories of persons. For example, the United Kingdom in 2006 extended the scope of its Acquired Rights Provisions to service provisions changes. Third and finally, the directive itself may provide certain optional provisions. *Cf.* Van Bochove 2014, p. 155; Remien 2011, p. 341.

national acquired rights provisions to these types of undertakings which follows from the wording 'unless the Member States provide otherwise' in Article 5(1). Once a Member State has decided to extend its national acquired rights provisions to insolvent undertakings Article 5(2) provides that this extension may be subject to certain, specifically mentioned, limitations. Where a directive is accompanied by a specific scope rule delineating its application, the purpose of the directive can, on occasion, only be achieved by affording overriding effect to its provisions. According to *Kania* it is in cases where the European legislator has provided several options for extending the scope of protection of the directive, that the existence of such gold-plating or optional provisions is likely to lead to their application as overriding mandatory provisions beyond the minimum protection offered by the directive. In this, the overriding effect of national implementation provisions does not occur by chance, but is effectuated, perhaps unwittingly, by the directive itself.[1037] In essence this means that the overriding effect of national acquired rights provisions, even if offering more protection than provided by the directive, stems directly from the directive and the scope rule contained therein. To my mind however, this view is not to be endorsed. National acquired rights provisions exceeding the minimum protection standards set forth by the Acquired Rights Directive do not simply hitch a ride to the considerations underlying the overriding nature of provisions stemming directly from the directive. As is clear from the judgment in *Unamar* provisions exceeding the minimum protection afforded by a directive may be classified as overriding mandatory provision only if their application is considered essential by the Member State concerned.[1038]After all in *Unamar* the ECJ gave validity to the possible application of overriding mandatory provisions of national law that exceed the minimum protection offered by a directive. As such, a Member State may apply its provisions exceeding minimum harmonisation in spite of the *lex causae.* In order to establish whether these national provisions have overriding mandatory effect the national court must ´take account not only of the exact terms of that law, but also of its general structure and of all the circumstances in which that law was adopted in order to determine whether it is mandatory in nature in so far as it appears that the legislature adopted it

[1037] Kania 2014, p. 206; Schwartz 2002, p. 70.
[1038] Case C-184/12 *Unamar* [2013] ECLI:EU:C:2013:663

in order to protect an interest judged to be essential by the Member State concerned.'[1039] Even if the *lex causae* refers to the law of a Member State that has correctly transposed the provisions of a directive may the overriding gold plating or scope-extending provisions of the *lex fori* be applied if these provisions intend to protect essential interests.[1040] The court in *Unamar* makes a clear distinction between national implementation provisions and provisions that that surpass the protection awarded by the directive.[1041] It fails however to take account of the notion that these overriding mandatory provisions may be embedded into national legislation and entangled with the general implementation provisions of a directive in such a way that their separation may prove a burdensome, if not impossible, task. The question therefore arises whether accepting national overriding provisions offering a surplus to a directive necessarily entails the concomitant application of its general implementation provisions, if only for reasons of legal certainty and practicability.

Overall, in relation to the Acquired Rights Directive the effect of the judgment in *Ingmar* is somewhat limited. First, there exists a special protective conflict of laws provision for individual employees that does not exist for the commercial agent, limiting the effects of the judgment in *Ingmar*. Indeed Article 8(1) of the Rome I Regulation severely limits the choice of law in individual contracts of employment by securing the application of the mandatory provisions of the objectively applicable law whenever they are more beneficial to the employee. As such, the judgment in *Ingmar* may only have effect in situations where both the choice of law and the objectively applicable law do not point to the laws of a Member

[1039] Case C-184/12 *Unamar* [2013] ECLI:EU:C:2013:663

[1040] Case C-184/12 *Unamar* [2013] ECLI:EU:C:2013:663para. 51; in applying the overriding extending provisions of the *lex fori* over those of the *lex causae* the court must take some caution in order not to compromise the harmonizing effect of the directive.

[1041] Another idea that stems from the judgments in Unamar and Ingmar is that certain provisions may be considered part of the *lex causae* as well as overriding mandatory provisions, thus putting an end to the notion that there exists a strict dichotomy between these types of rules. Thus, in relation to the Acquired Rights Directive, the application of Article 8 Rome I Regulation does not necessarily exclude the application of Article 9.

State.[1042] Second, the Acquired Rights Directive is equipped with an express scope rule delineating when it is to be applied, a scope rule that did not exist in the Commercial Agents Directive. Thus where it may be derived from *Ingmar* that overriding effect is only attributed to secondary European Union law if the provisions stemming from directives according to their purpose and aim require application irrespective of the choice of law made by the parties, this classification as overriding mandatory is superfluous if effect is directly given to the scope rule of Article 1(2) of the Acquired Rights Directive.[1043] In this, the question that arises is that of the effect of the scope rule on national implementation provisions. In other words, what is the effect of Article 1(2) of the Acquired Rights Directive and how should it be implemented into national legislation?

*6.2.2.6 Translation of Art. 1(2) ARD into national law*

In essence there are two ways to translate Article 1(2) of the Acquired Rights Directive into national legislation. First, there may be a literal translation of the provision that will secure the application of national acquired rights provisions whenever the undertaking to be transferred is situated within a European Member State. Second, the Member States could translate the provisions to their own territories in the sense that national acquired rights provisions will only apply if the undertaking to be transferred is situation within the national territory of the affected Member State. The majority of Member State acquired rights provisions do not possess a scope rule similar to that of the Acquired Rights Directive. This is different only for a handful of Member States, which have made use of either the first or the second option in translating the provision of Article 1(2) Acquired Rights Directive into their national legislation. Denmark and Greece have (almost) literally transposed Article 1(2) of the Acquired Rights Directive into their national legislation by limiting the application of their national acquired rights provisions to the undertaking to be transferred being situated within the

[1042] This was the case in the infamous '*Amerikanische Piloten'* case in which the German *Bundesarbeitsgericht* ruled against the application of its national acquired rights provisions as overriding mandatory rules: BAG 29 October 1992 – 2 AZR 267/92.

[1043] In this sense it should be noted that the provisions stemming from the Acquired Rights Directive are likely to be classified as overriding mandatory provisions since they are based in internal market interest in addition to protecting the interests of the individual and collective employee(s).

territorial scope of the Treaty[1044] or to the transfer of an undertaking whenever it is situated within the area to which the Treaty establishing the European Economic Area is applied.[1045] By doing so, they have, in all appearances, complied with the Acquired Rights Directive and Article 1(2). When compared to the implementation measures that limit their application to national territory the application of Danish and Greek acquired rights provisions appears broader in nature. If a literal application of the scope rule in Article 1(2) is utilised to apply national legislation[1046]national acquired rights provisions will be applied whenever the undertaking to be transferred is situated within EU territory and the case falls within the jurisdiction of the courts of the Member State concerned. The existing differences in the (perceived) territorial scope of national acquired rights provisions may result in different national laws applying in different Member States. This, to some extent, negates the primary purpose of the Acquired Rights Directive which is to harmonise the laws of the Member States in order to safeguard the rights of employees upon a transfer of undertaking. Conversely, it is this same harmonisation that should ensure minimum protection upon a transfer of undertaking throughout the Member States. Thus, the laws of the Member States, by complying with the directive, should all ensure that the rights of employees upon a transfer of undertaking are safeguarded to a minimum extent.

With respect to the second option of transposition, it has on occasion, been stated that the Member States that apply this option do not comply with the Acquired Rights Directive by limiting the application of their national acquired rights provisions to the undertaking being transferred to be situated within their territory immediately prior to the transfer.[1047] However, Article 1(2) of the Acquired Rights Directive clearly states that the provisions of the

[1044] Greece.

[1045] Denmark.

[1046] Here a literal interpretation is intended only, since only the wording of existing legislation and not its interpretation in case law is studied.

[1047] McMullen 2005, p. 298; Laagland 2011, p. 19, who commenting on the acquired rights provisions of the UK suggests that TUPE applies whenever the transferred undertaking is situated in the United Kingdom, while surely meaning that the undertaking *to be transferred* has to be situated within the United Kingdom for TUPE to apply. She believes that employees suffering damages as a result of the, in her view, erroneous implementation of the Acquired Rights Directive can at best apply/ sue for damages.

directive 'shall apply where and in so far as the undertaking, business or part of the undertaking or business to be transferred is situated within the territorial scope of the Treaty'. This territorial scope could surely translate to the Member States applying their national acquired rights provisions where and insofar as the undertaking, business or part of the undertaking or business to be transferred is situated within their territory. After all, the 'territorial scope of the Treaty' mainly comprises the combined European territory of the EU Member States and as such, the territory of the European Union forms the sum of its constituent parts. Thus, if each Member State were to apply its national acquired rights provisions whenever the undertaking to be transferred is located within its territory, the combined application of the national acquired rights provisions of the European Member States will comprise the territorial scope of the Acquired Rights Directive itself. In other words, the proper application of Article 1(2) of the Acquired Rights Directive is ensured by the European Member States limiting the application of their national acquired rights provisions to the undertaking being transferred being located within their territory. Surely, the individual European Member States are unable to apply their national legislation outside their national borders, save for the situations where the conflict of laws, in international situations, points to the application of their law(s), to the same extent as the European Union is unable to impose Community legislation on non-Member States. Limiting the application of national acquired rights provisions to the undertaking to be transferred being located within the territory of the Member State in question will surely result in the protection of employees involved in outbound transfers only. Countries that utilize this second approach are e.g. the United Kingdom, Luxembourg and Malta.[1048] In the example of the United Kingdom, this means that a business transfer from the United Kingdom to a country outside the United Kingdom, whether an EU Member State or a third country will result in the application of the United Kingdom's national acquired rights provisions, i.e. the TUPE Regulations. In the reverse situation, involving an inbound transfer, i.e. where the business being transferred is transferred from a Member State to the UK, the provisions of TUPE will not protect the affected employees.[1049] This situation is not irreconcilable with Article 1(2)

[1048] See Chapter 2.
[1049] McMullen 2005, p. 298-299.

of the Acquired Rights Directive since in the event of an inbound transfer under which a business or undertaking is transferred from a Member State to the United Kingdom, the national acquired rights provisions of the Member State of origin will apply, resulting in compliance with the Acquired Rights Directive. Where it involves an inbound transfer according to which the undertaking being transferred is situated immediately before the transfer in a non-Member State the Member States are surely free to impose their national acquired rights provisions on the employees affected by the incoming business or undertaking.[1050] The Acquired Rights Directive however, does not require them to do so, as the directive itself does not extend to these types of transfer scenarios. The directive merely ensures that the rights of workers employed in European based undertakings are safeguarded upon the transfer of such undertakings. In summary, although the territorial scope contained in Article 1(2) of the Acquired Rights Directive does not require the Member States to limit the application of their national implementation measures whenever the undertaking, business or part of an undertaking of business *to be transferred* is located within their territory, it neither precludes the Member States from doing so. As such, the national acquired rights provisions may take the form of a unilateral scope rule with multilateral implications in the sense that the application of the national acquired rights provisions is dependent on the geographical location of the undertaking to be transferred. Insofar as it involves intra-European transfers of undertakings, or outbound transfers of undertakings from a Member State to a non-Member State the application of the Acquired Rights Directive through the actual application of its national counterparts is ensured.[1051] Thus, the UK's acquired rights provisions, which apply to a transfer of an undertaking situated immediately before the transfer in the United Kingdom, remain unapplied when, for example, a Dutch undertaking, situated in the Netherlands, is transferred from a Dutch transferor to an English transferee coupled with a simultaneous relocation to the United Kingdom. Article 3(1)(a) of the UK's TUPE Regulations unilaterally sets forth when the Regulations themselves apply and remains silent on the application of

[1050] Article 8 of the Acquired Rights Directive permits the Member States 'to apply or introduce laws, regulations or administrative provisions which are more favourable to employees or to promote or permit collective agreements or agreements between social partners more favourable to employees.'
[1051] *Cf.* Henckel 2012, p. 376 *et seq*.

foreign law. The law applicable to such a transfer, from the Netherlands to the United Kingdom, will have to be determined by the English court, according to its own private international law. It is unclear which law, according to English private international law, applies to a transfer of undertaking in the absence of the TUPE regulations being applicable. What is clear however, that in these circumstances the undertaking to be transferred is situated within Member State territory prior to the transfer, thus requiring the application of the laws of a Member State, i.e. national implementation measures corresponding to the provisions of the directive. In the aforementioned example, Article 1(2) does not require the UK (or any other European Member State) to apply its own implementation measures, rather Article 1(2) requires the application of Member State implementation measures irrespective of the method through which this is achieved. Thus the provisions of the Member States such as the United Kingdom, Malta and Luxembourg, which have limited the application of national law to the undertaking being transferred being situated within national territory is not incompatible with the directive as long as Member State acquired rights provisions are applied whenever the undertaking to be transferred is situated within EU territory.[1052] *Laagland,* however, believes that the United Kingdom (and by extension likely all countries in the second category) has failed to properly transpose Article 1(2) of the Acquired Rights Directive.[1053] In her belief, limiting national acquired rights provisions to the location of the undertaking being transferred upon national territory is an unwarranted narrowing of the scope of the Acquired Rights Directive. More so, she believes that employees suffering damages as a result are entitled to claim damages from the United Kingdom. This vision is at odds with the idea that the provisions of the directive are overridingly mandatory by virtue of a distinct scope rule (encompassed in Article 1(2) Acquired Rights Directive) which seeks connection to the location of the undertaking to be transferred, which is a view also portrayed by *Laagland*.[1054] Assimilated under the

[1052] Such application would certainly be guaranteed if multilateral implications are attributed to the unilateral conflict of laws provisions of the Member States in the second group. In other words, if the application of Member State law were to be made dependent on the undertaking to be transferred being situated in that distinct Member State upon or immediately prior to the transfer.
[1053] Laagland 2011, p. 19
[1054] Laagland 2011, p. 18.

doctrine of overriding mandatory rules, the acquired rights provisions apply by virtue of their distinct scope and are in no need of a special conflict of laws rule determining their application where their protection is limited to the minimum level of employment protection offered by the Acquired Rights Directive.[1055] The application of these national acquired rights provisions is dependent on the scope rule contained in Article 1(2) of the Acquired Rights Directive and in that sense tied to the territory of the Member States. The directive does not require the laws of the countries of both the transferor and the transferee to simultaneously apply in intra-European transfer scenarios,[1056] leaving aside the likely impossibility of such cumulative application.[1057] Sufficient is that the national acquired rights provisions of at least one Member State are applicable in cases involving an intra-European transfer of undertaking. As each Member State is obliged to comply with the minimum protection awarded by the directive, employees adversely affected by the non-application of the laws of the country of the transferee are by no means entitled to damages, at least not on the basis of European law. Surely, as mentioned above, the directive itself only states that it applies where and in so far as the business or undertaking to be transferred is situated within the territorial scope of the Treaty and remains silent on the territorial application of the national implementation measures. It follows from the wording of the Acquired Rights Directive that it applies to intra-European and outbound, i.e. outside the EU, transfers of undertakings alike. Whereas a literal interpretation may not warrant the limitation of national acquired rights provisions to the undertaking to be transferred being situated within their distinct national territory, a rational and teleological interpretation does. The EU has the authority to impose legislation on the (combined) EU territory, whereas the Member States have the ability to do so within their national territory (naturally save for situations where by reason of the conflict of laws their legislation is applied across national borders). Moreover, the Acquired Rights Directive is largely based in the idea of safeguarding the rights of employees in the event of a transfer of undertaking, thus ensuring to some extent equal competition throughout the

[1055] Henckel 2012, p. 376 – 389; *Cf.* Symeonides 2014, p. 300; Van Bochove 2014, p. 153.
[1056] See paragraph 3.2.1.
[1057] The possible cumulative application of acquired rights provisions in force and the country of the transferor and that of the transferee is discussed above in paragraph 5.3.

Common Market. From a Common Market perspective, according to *Fetsch,* the location of the undertaking to be transferred is the most natural connecting factor in determining the application of the directive and its national counterparts.[1058] As stated above, the directive itself contains no direct conflict of laws provisions and leaves it to the Member States to determine the law that applies to a given transfer of undertaking. In doing so, the Member States appear free to utilise the connecting factor they feel is best suited to ensure the continuation of acquired employment rights upon a transfer of undertaking as long as this does not conflict with Article 1(2).

In any event, the scope rule of Article 1(2) of the Acquired Rights Directive is clear when it comes to the application of the directive itself but may be difficult to translate into national law. What is clear from the provision of the directive is that the provisions of a Member State have to be applied whenever the undertaking to be transferred is situated within European territory, whether this translates to national law applying to the combined EU territory or whether the application of national law could be limited to national territory remains unclear. Again, the directive secures the application of Member State legislation whenever the undertaking to be transferred is situated within the territory of a Member State, but remains silent on the method through which this application is to be achieved. Still, the Member States that have not transposed the scope rule into their national legislation are required to apply the so-called directive-compliant interpretation by reason of the lack of an express provision regarding the territorial scope of their national acquired rights provisions. Surely the Member States are free not to achieve implementation via legislative action. However, where they choose to do so, transferee, transferor and the affected employees must be able to easily determine when a transfer of undertaking occurs in order to determine their legal position. After all, the application of the national acquired rights provisions is not spontaneously limited to the undertaking to be transferred being situated within a Member State's distinct

[1058] As the next Chapter(s), in particular Chapter 5 and 6, will show, there are a variety of views and theories on the most appropriate conflict of laws method for determining the applicable law in the event of a cross-border transfer of undertaking. Since this paragraph merely seeks to establish if, in principle, the Acquired Rights Directive and its national counterparts apply to a cross-border transfer of undertaking a detailed discussion and overview of these views and methods will not be provided at this juncture.

territory. Thus, the Member States have to actively ensure that Article 1(2) of the Acquired Rights Directive is properly applied and transposed. In any event, they will have to ensure, that a Member State's national acquired rights provisions are applied whenever the undertaking to be transferred is situated within European territory prior to the transfer. If their acquired rights provisions are not naturally applied in the aforementioned event, the Member States and national courts will have to apply directive-compliant interpretation to ensure compliance with the Acquired Rights Directive. Thus, for example, in the so-called *Amerikanische Piloten*-case[1059] in which the German *Bundesarbeitsgericht* famously ruled against the application of §613a BGB as overriding mandatory rule, the German acquired rights provisions should have been applied irrespective of the affected employees' employment contract being subject to the laws of New York. As mentioned above, the case involved the transfer of a Berlin based aviation business, involved in domestic German air travel, from Pan American World Airways to Berliner Lufthansa Airport. In this case, the *BAG*[1060] concluded that neither §613a BGB nor the national acquired rights provisions of another Member State were applicable, even though the undertaking transferred was situated in Germany both before and after the transfer.[1061] The ruling in this case abundantly conflicts with Article 1(2) of the Acquired Rights Directive, according to which the national acquired rights provisions of a Member State should always apply whenever the undertaking to be transferred is situated in European territory. More so, the *BAG* should have utilized a directive-compliant interpretation ensuring the application of § 613a BGB, irrespective of the employment contract being governed by the laws of the State of New York both by reason of choice of law and as applicable law in the absence of choice (due to the law of the habitual place of employment being set aside by reason of the circumstances of the case making the contract more closely connected with the State of New York). Surely, the result of the conflict of laws reference (in this case connection is sought to the employment contract) should not be able to set aside the mandatory provisions arising from the Acquired Rights Directive. *A fortiori*, Article

[1059] BAG 29 October 1992 – 2 AZR 267/92.

[1060] This conclusion was based on Articles 30 and 34 EGBGB (the German provisions transposing Articles 6 and 7 of the Rome Convention 1980).

[1061] BAG 29 October 1992 – 2 AZR 267/92.

1(2) of the Acquired Rights Directive contains an express scope rule, which holds an inherent conflict of laws implication that national acquired rights provisions will apply whenever the undertaking *to be transferred* is situated within the territory of a Member State, but remains silent on which national acquired rights provisions are to be applied in any given case. Leaving aside whether Article 1(2) should (naturally) translate to the Member States limiting the application of their national acquired rights provisions to the undertaking to be transferred being situated within their distinct territory, the national transposition measures should undoubtedly ensure the application of the laws of a Member State whenever the undertaking to be transferred is situated within the territory of the European Union. Where national implementation measures fail to do so, a conflict with Community law, i.e. Article 1(2) of the Acquired Rights Directive, arises.[1062] This failure to properly implement the directive may be remedied first by legislative action and second by directive-compliant interpretation. In any event, where, upon the transfer of a European based undertaking, application of Member State acquired rights provisions is not guaranteed, a correction of the result of the conflict of laws reference should come to pass.[1063] Such a correction may occur on the basis of Article 1(2) of the Acquired Rights Directive, by giving overriding effect to the acquired rights provisions of the *lex fori.* Thus, although in my opinion a transfer of undertaking falls outside the scope of the Rome I Regulation and should form an independent conflict of laws category for which a connection to the individual contract of employment is wholly unsuited, if such a connection and application *is* assumed giving overriding effect to national acquired rights provisions[1064] solves the situation when the applicable law does not point to the laws of a Member State despite the undertaking to be transferred being situated in a European Member State. Here the question arises whether this overriding effect is applied by way of the provision on overriding mandatory rules (Article 9) or through Article 23 of the Rome I Regulation.

[1062] Krebber 1998, p. 140.

[1063] Such correction mechanisms can generally be found in the doctrines of public policy and overriding mandatory rules. For more on this and the relation of these mechanisms to the transfer of undertakings para. 6.2 and 6.2 of the current Chapter.

[1064] Such application cannot be afforded to the directive itself since it does not directly apply to private parties within the Member States.

*6.2.2.7 Article 23 Rome I Regulation*

Article 23 of the Rome I Regulation lays down the maxim of *lex specialis derogat legi generali*, according to which priority is to be given to the conflict of laws provision that is most specific. As per Article 23:

> '(…) this Regulation shall not prejudice the application of provisions of Community law which, in relation to particular matters, lay down conflict-of-law rules relating to contractual obligations.'[1065]

Surely, where conflict of laws rules are dispersed among several instruments of Community law, differences between these instruments should, as far as possible, be prevented.[1066] However, the Regulation does not hold an exclusion preventing conflict of laws mechanisms from being contained within other instruments of Community law. Specific European law instruments on particular matters containing conflict of laws rules relating to contractual obligations take precedence over the Rome I Regulation and the conflict of laws provisions enclosed therein. In addition, the Rome I Regulation gives way to the application of particular instruments contributing to the proper functioning of the internal market and entailing the free movement of goods and services in the sense that the law designated by the regulation may not conflict with the application of these instruments. In other words, if these instruments cannot by applied in conjunction with the law designated by the conflict of laws provisions of the regulation, the regulation shall not be applied.[1067]

According to the European Commission, in its Green Paper for a revision of the Rome Convention, the proliferation of rules determining their own scope, especially those designed to protect weaker parties, is cause for concern. This concern is furthered by the fact that the determination of the territorial scope of especially secondary European Union law has an impact

[1065] The wording of this Article is similar to that of Article 20 of the Rome Convention. Article 20 Rome Convention: This Convention shall not affect the application of provisions which, in relation to particular matters, lay down choice of law rules relating to contractual obligations and which are or will be contained in acts of the institutions of the European Communities or in national laws harmonized in implementation of such acts.'

[1066] Recital 40 Rome I Regulation.

[1067] Recital 40, paragraph 2 Rome I Regulation.

on the applicable law and may eventually 'harm the consistency of the body of conflict rules applicable in the Union'.[1068] Most of the directives and scenarios discussed in the Green Paper have to do with consumer protection[1069] rather than employee protection. Although several directives comprising explicit scope rules are based in weaker party protection, the Acquired Rights Directive enjoys a special role due to the fact that a transfer of undertaking occurs by operation of law rather than being the result of party autonomy.[1070] In the area of consumer protection party autonomy is an important factor. In this sector, directives are accompanied by scope rules in order to avoid their non-application by reason of a contractual choice of law for a third state. These specific scope rules, on occasion referred to as 'unwanted intruders into the realm of the Rome Convention',[1071] generally refer to a close connection with the territory of the European Union and thus hold unintelligible connecting factors compared to the uniform and easily determined conflict of laws connections utilized in the Rome Convention and the Rome I Regulation.[1072] In addition, as stated above, the unilateral approach of these specific scope rules is dogmatically and practically at odds with the multilateral approach offered in the Rome Convention and the

[1068] Green Paper, p. 17.

[1069] *Cf.* Art. 6(2) of the Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (O.J. EC 1993 L 95, p. 29–34); art. 12(2) of the Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect to distance contracts (O.J. EC 1997 L 144, p. 19–27); Art. 7(2) of the Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (O.J. EC 1999 L 171, p. 12–16); Art. 12(2) of the Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC (O.J. EC 2002 L 271, pp. 16– 24); a slightly different approach is followed by Art. 9 of the Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect to certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis (O.J. EC 1994 L 280, p. 83–87): "whatever the applicable law may be."

[1070] In this sense one might even ask whether the a transfer of undertaking is within the scope of the Rome I Regulation. Still, if assimilated under the conflict of laws category for individual employment contracts, the employment contract may contain a choice of law that leads to the application of the laws of a non-Member State.

[1071] Magnus & Mankowski 2002; *Cf.* Jayme & Kohler 1995, p. 11-36; Wilderspin & Lewis 2002, p. 292-294, 307.

[1072] Magnus & Mankowski 2002.

Rome I Regulation. More so, additional conflict of laws rules in specific legislation may cloud the clear and easily accessible conflict of laws regime that is to be found in the Rome I Regulation.

The provision of Article 23 Rome I Regulation applies to all provisions of Community law that hold a special implication for the conflict of laws, including those in directives. However, since directives are not directly applicable to private individuals the provision of Article 23 equally applies to the harmonized national law of the Member States. In this, the wording of Article 23 Rome I Regulation differs from that of its predecessor, Article 20 Rome Convention, which clearly stipulated that the Convention does not affect 'the application of provisions which, in relation to particular matters, lay down choice of law rules relating to contractual obligations and which are or will be contained in the acts of the institutions of the European Community or in national law harmonized in implementation of such acts'. As such, national acquired rights provisions implementing a specific choice of law provision stemming from the Acquired Rights Directive may supersede the application of the Rome I Regulation by reason of Article 23 Rome I Regulation. The question then remains whether Article 1(2) of the Acquired Rights Directive qualifies as such a specific conflict of laws provision. Above, I have briefly mentioned that many acts of secondary European Union law include specific provisions regarding their scope of application, unilaterally determining when they are to be applied. Although Article 1(2) Acquired Rights Directive qualifies as such a scope rule it remains questionable whether it in itself constitutes a conflict of laws provision. In the sparse amount of legal literature on the matter it is assumed that this is not the case.[1073] After all, the provision of Article 1(2) does not directly hold any express implications for the conflict of laws; it merely delineates its territorial application. The directive does not clarify which law is to be applied to a cross-border transfer of undertaking in situations involving a conflit of laws. More so, as the previous subparagraph has shown, the provision is somewhat ambiguous and the Member States share different views on how the provision is to be translated into national law, highlighting that ensuring the proper application of Community law by means of unilateral (conflict of laws) provisions or distinct scope rules,

[1073] Kania 2012, p. 180.

especially when geared towards application within the EU territory as a whole, does not fit in well with the existing conflict of laws regime.

*6.2.2.8 Article 4(3) TEU*

On occasion, it is considered that the duty of sincere cooperation that is enshrined in Article 4(3) TEU has some bearing on the overriding application of national implementation provisions, especially where their application cannot be ensured by means of Article 9 Rome I Regulation.[1074] Article 4(3) TEU reads:

> 'Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.
>
> The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.
>
> The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.'

On the basis of the above Article it may be that overriding effect is to be given to national provisions implementing directives if this is the only way through which Union objectives (or the objectives of directives in general) can be achieved. It is this very question that was recently posed to the ECJ by the German *Bundesarbeitsgericht.*[1075] One of the questions referred to the court was whether the principle of sincere cooperation enshrined in Article 4(3) TEU is relevant 'for legal purposes, for the decision of national courts on whether overriding mandatory provisions of another Member State are directly or indirectly applicable?'[1076] This case, which does not involve the Acquired Rights Directive, but may have a direct effect on its application, has not yet been decided upon by the ECJ. Thus it remains to be decided whether Article 4(3) has some effect on how national courts are to deal with

[1074] Kania 2012, p. 175, 176, 227; BAG 25 December 2015 – 5 AZR 962/13.
[1075] BAG 25 December 2015 – 5 AZR 962/13.
[1076] BAG 25 December 2015 – 5 AZR 962/13; Case C-135/15 *Nikiforidis.*

overriding provisions of other Member States that find their basis or origin in European Union law. To me however it seems contrary to the aim and purpose of the Rome I Regulation to allow the Member States to bypass Article 9 Rome I Regulation (and 23 Rome I Regulation) by directly applying national implementation provisions of third states. After all, Article 9(3) severely limits the application of third state overriding mandatory provisions excluding their application when they are not part of the laws in force at the place of performance of the contract. In addition, Article 9(3) only gives effect to third state overriding mandatory provisions where these provisions render the performance of the contract unlawful. As such certain provisions, such as national acquired rights provisions, are excluded from Article 9(3) by their very nature.[1077] In this sense it seems inappropriate to, by reason of Article 4(3) TEU, circumvent Article 9(3) by applying the overriding provisions of third states that are beyond the scope of Article 9(3) and that do not possess any accompanying conflict of laws provisions in the sense of Article 23 Rome I Regulation. Thus an overriding mandatory application of foreign mandatory provisions on the basis of Article 4(3) TEU is incompatible with the regime of Rome and Article 9(3) Rome I Regulation.[1078] A-G *Maciej Szpunar* in his opinion in the abovementioned case of *Nikiforidis*[1079] reaches a similar conclusion by stating that the principle of sincere cooperation, as encompassed by Article 4(3), does not bestow upon the Member States a duty to apply the overriding mandatory provisions of other Member States, not even when such application would serve to fulfill this state's obligations towards the European Union. This includes both the case in which a national court wishes to review these provisions in light of the application of the *lex causae* and the case of application of Article 9(3) Rome I Regulation.[1080]

[1077] See above paragraph 6.2.2.5.

[1078] To this end it should be noted that certain Member States, such as Germany and Poland, within their national law allow foreign overriding mandatory provisions to be taken into account on a substantive level.

[1079] Opinion Advocate General Maciej Szpunar *Nikiforidis* Case C-135/15 [2016] ECLI:EU:C:2016:281*; Cf.* BAG 25 December 2015 – 5 AZR 962/13.

[1080] Opinion Advocate General Maciej Szpunar Case C-135/15 *Nikiforidis* [2016] ECLI EU C2016, 281, para. 125: *'Angesichts dessen bin ich der Ansicht, dass man dem Grundsatz der loyalen Zusammenarbeit – wie ihn Art. 4 Abs. 3 EUV aufstellt – nicht die Pflicht entnehmen kann, Bestimmungen eines anderen Mitgliedstaats Wirkung zu verleihen, selbst dann nicht, wenn sie dazu dienen, die Verpflichtungen dieses Staates gegenüber der Union zu erfüllen.*

*Kania,* however, believes that where it concerns cross-border transfers of undertakings, the overriding effect of national acquired rights provisions stems directly from Article 4(3) TEU requiring the Member States to apply the overriding mandatory acquired rights provisions of other Member States in the event of a cross-border transfer of undertaking.[1081] Such application, according to *Kania,* would ensure the application of e.g. German acquired rights provisions in the event of a cross-border transfer of undertaking from Germany to another (Member) State to the extent that the German acquired rights provisions are classified as overriding mandatory provisions.[1082] In this the Acquired Rights Directive is considered a *lex specialis* to the Rome I Regulation. The reasoning behind this special conflict of laws treatment of the Acquired Rights Directive (over Article 9(3) Rome I Regulation) lies in the notion that the overall purpose of the directive cannot be achieved without special overriding application of national acquired rights provisions.[1083] Surely national acquired rights provisions fall outwith Article 9(3) Rome I Regulation as they do not render any kind of contract unlawful.[1084] However, to my mind the non-application of Article 9(3) in relation to cross-border transfers of undertakings does not necessarily conflict with the Acquired Rights Directive and the scope rule of Article 1(2). Surely if full literal effect is given to Article 1(2) of the Acquired Rights Directive, national acquired rights provisions are applicable whenever the undertaking to be transferred is situated in a European Member State. Thus, by reason of Article 1(2) national acquired rights provisions may apply whenever the undertaking to be transferred is situated within EU territory, regardless of whether the undertaking is situated in national territory (*i.e.* the territory of the forum state) prior to or upon the transfer. The fact that in giving full effect to Article 1(2) the application of the law of

*Dies betrifft sowohl den Fall, in dem das Gericht die Berücksichtigung dieser Bestimmungen als tatsächliche Umstände im Rahmen der Anwendung der lex causae erwägt, als auch den Fall der Anwendung von Art. 9 Abs. 3 der Rom-I-Verordnung durch das Gericht.'* [not yet available in English]

[1081] Kania 2012, p. 176, 227; *Contra* Niksova 2014, p. 102-103.

[1082] Kania 2012, p. 176.

[1083] Kania 2012, p. 227; He comes to this conclusion in order to prevent a *Statutenwechsel* and to prevent transferee and transferee from taking advantage of such a change in law and purposely circumventing the application of acquired rights provisions (e.g. by letting the relocation preceed the transfer of undertaking).

[1084] See above, paragraph 6.2.2.5.

the forum state, in some cases, does not correspond to the application of the law of the Member State from which the transferred undertaking originates may not be contrary to the meaning of the Acquired Rights Directive. After all, Article 1(2) of the directive requires the application of national acquired rights provisions whenever the undertaking to be transferred is situated within the territory of a Member State but does not designate which national acquired rights provisions are to be applied in this event. As such it appears that the Acquired Rights Directive itself makes no distinction between the national implementation laws of the Member States. Indeed, all Member States are to transpose the provisions of the directive into national law, thus ensuring a certain minimum level of employment protection throughout the European Union. In this, it may not matter whether the laws of a particular Member State are applied in a given case. As long as the provisions of a Member State are awarded application the minimum level of employment protection guaranteed by the directive is ensured. If the national acquired rights provisions are to be considered overriding mandatory provisions by reason of both their aim and purpose and the scope rule contained in Article 1(2) Acquired Rights Directive the application of national acquired rights provisions is already ensured on the basis of Article 9(2) Rome I Regulation which facilitates the application of the overriding mandatory provisions of the *lex fori* Surely any Member State is free to argue that the exceeding protection offered by their acquired rights provisions requires overriding application over the laws of another Member State.[1085] In the latter scenario however the overriding effect finds its basis in national law and cannot be granted by way of Article 4(3) TEU. More so, it appears that their application can neither be ensured by Article 9(3) Rome I Regulation.

*6.3 Concluding remarks*

In conclusion, it appears that the doctrine of overriding mandatory provisions is exclusively reserved for provisions that surpass the interests of the individual. More so, provisions that are driven by socio-political interests, such as those involving weaker party protection, should not readily be presumed overriding mandatory by nature. In fact, these provisions are primarily intended to strike a balance between the interests of the parties involved in the contract. In these situations the protection principle inhabited

[1085] *Cf.* Case C-184/12 *Unamar* [2013] ECLI:EU:C:2013:663.

by the conflict of laws reference encompassed in Article 8 of the Rome I Regulation generally offers sufficient protection. The provisions stemming from the Acquired Rights Directive, although party rooted in the interests underlying the establishment of the internal market,[1086] are primarily intended to protect the employees affected by the transfer of undertaking. Even though the directive makes provision for the transfer of rights and obligations stemming from collective agreements and the preservation of function and position of employee representatives it does so, primarily in the interests of the affected employees. In case law and legal literature it is therefore largely assumed that the national provisions implementing the Acquired Rights Directive are not to be classified as overriding mandatory provisions.[1087] Still, it may be argued that the internal market considerations and the collective employment aspects insert an interest into the Acquired Rights Directive that surpasses that of the individual allowing the national implementation provisions to act as overriding mandatory provisions in respect of the *lex causae.*[1088] However, since the Acquired Rights Directive is equipped with a distinct scope rule one could also ask whether there is even a need for such a classification as overriding mandatory provisions. After all the dogmatic distinction of whether a provision is considered overriding mandatory or not is immaterial whenever a provision of national law is equipped with a specific scope rule. In such situations there need not be a study of whether the rule to which the scope rule applies is to be classified as overriding mandatory. In this the overriding nature of certain provisions may stem from their accompanying scope rule allowing their application as overriding mandatory provisions under Article 9 Rome I Regulation. After all, Article 9(2) Rome I Regulation clearly emphasizes that 'nothing shall restrict the application of the overriding mandatory provisions of the forum.' It could therefore be argued that by reason of the scope rule in the Acquired Rights Directive, national acquired rights provisions may require application whenever the undertaking to be transferred is situated within the territory of a Member State, irrespective of and without

[1086] Case C-381/98 *Ingmar GB Ltd v Eaton Leonard Technologies Inc* [2000] *ECR* I-09305, ECLI:EU:C:2000:605

[1087] Däubler 2008, p. 126. *Cf.* Haanappel-van der Burg 2016 I, p. 8; Rehbahn, p. 234 (who argues that provisions should not easily be considered overriding mandatory provisions); BAG 29 October 1992 – 2 AZR 267/92.

[1088] Kania 2014, p. 186-187; Laagland 2011, p. 17-18.

determination of the law that would otherwise govern the situation.[1089] However, the classification as overriding mandatory cannot stem directly from the directive itself and is left to the Member States themselves. It is their national acquired rights provisions that may require overriding application since the directive itself is not directly applicable to individual actors within the Member States.[1090] This classification of national acquired rights provisions as overriding mandatory by reason of Article 1(2) of the Acquired Rights Directive will prove difficult. After all, the Member States do not agree on the significance of Article 1(2) of the directive and the way in which it is to be implemented into national law. Whereas some Member States appear to apply their national acquired rights provisions whenever the undertaking to be transferred is situated within a European Member State,[1091] others have limited the application of their provisions to national territories[1092] while the majority has refrained from awarding any significance to the scope rule of Article 1(2) at all.[1093] By equipping the Acquired Rights Directive with a distinct scope rule the European legislature has not created a unilateral conflict of laws system that operates independent to the general conflict of laws regime that exists within European Regulations. If given overriding effect within the realm of the Rome I Regulation such effect can only come to pass on the basis of Article 9 or Article 23 Rome I Regulation. Yet the provisions of the Acquired Rights Directive and the scope rule contained therein are difficult to reconcile with either of these provisions. On the one hand the provisions of the Acquired Rights Directive may only apply if they are considered overriding mandatory provisions of the *lex fori* (a classification which in may prove difficult in practice)[1094] whereas on the other hand the precise nature of the scope rule

[1089] However due to its broad phrasing the scope rule of Article 1(2) does not solve issues of conflicting Member State laws as it does not determine which national acquired rights provisions are to apply in a given case. The classification of the Acquired Rights provisions as overriding mandatory due to the existence of Article 1(2) therefore does not solve the conflict of laws issues that exist for transfers of undertakings: see this paragraph, below.

[1090] *Cf.* Haanappel van der Burg 2016 I, p. 8.

[1091] Denmark and Greece.

[1092] United Kingdom, Malta, Luxembourg.

[1093] AU, BE, BG, CY, DE, EE, ES, F, FI, HR, HU, I, IE, PL, PT, SE, SI, NL.

[1094] National acquired rights provisions fall outside the scope of Article 9(3) Rome I Regulation: whereas the national implementation provisions of the forum may require direct application whenever the situation under consideration falls within their distinct scope, the

of Article 1(2) is uncertain, rendering its application on the basis of Article 23 Rome I Regulation ineffective. To my mind, this again highlights the incompatibility of the Acquired Rights Directive with the conflict of laws regime that exists under the Rome I Regulation. The fact that, drawing from the scope rule in Article 1(2), national acquired rights provisions can only be classified as having overriding effect when they give effect to the minimum protection of the Acquired Rights Directive,[1095] coupled with the inherent limitations of overriding mandatory rules as unilateral conflict rules, highlights the need for a complementary multilateral conflict of laws rule for transfers of undertakings. The scope rule of Article 1(2) only provides an overriding mandatory effect to national acquired rights provisions to the extent that these provisions form an implementation of the minimum protection ensured by the directive.[1096] Provisions exceeding the protection of the Acquired Rights Directive are not as easily classified as rules of an overriding mandatory nature. This classification is left to the Member States themselves and requires an assessment of the general structure and circumstances under which the law was adopted in order to determine whether it is of such importance that the Member State concerned finds its application to be essential.[1097] Thus, provisions exceeding the minimum protection offered by the directive will not be classified as rules with overriding mandatory effect of European descent.[1098] The application of these provisions will thus have to be determined by other means. In this sense it should be noted that in practice provisions exceeding the protection of the directive will often be entangled with provisions implementing minimum protection to such an extent that it will prove difficult, if not impossible, to separate the two. More so, the directive and its accompanying

(non-)classification of overriding mandatory provisions becomes more problematic where it concerns overriding mandatory provisions of states other than that of the forum.

[1095] This only holds true when the scope rule is understood and applied in such a way in the national law of the Member States.

[1096] In this sense, a national acquired rights provision with overriding mandatory effect will most likely equal the *lex causae* where it concerns the laws of a Member State. *Cf.* Henckel 2012, p. 388.

[1097] Case C-184/12 *Unamar* [2013] ECLI:EU:C:2013:663, para. 50.

[1098] Surely the Member States are free to determine the effect to be given to their national provisions. Yet, it seems unlikely that national courts are eager to allow Member State provisions offering more protection than the ARD to have an overriding effect on the *lex causae*. *Cf.* Pfeiffer 2002, p. 830-831, 834-835.

scope rule do not determine which national acquired rights provisions are to be applied in the event of a cross-border transfer of undertaking as it does not distinguish between the laws and territories of the Member States. As such, it remains undetermined which national acquired rights provisions are to be applied upon fulfillment of the scope of the directive. For the Member States that have limited the application of their acquired rights provisions to their distinct territory it remains undetermined which law or acquired rights provisions are to be applied whenever the undertaking to be transferred is situated beyond their territory. All these problems and ambiguities highlight the need for a complementary multilateral conflict of laws rule for transfers of undertakings. Before discussing the possibility and desired content of such a multilateral conflict of laws rule I will discuss two slightly alternate theories and solutions proposed in relation to cross-border transfers of undertakings and the conflict of laws.

## 7. Alternate theories and solutions

In addition to the conflict of laws theories discussed above, i.e. connection to the transfer agreement, the individual contract of employment, the location of the undertaking to be transferred or the direct application of national acquired rights provisions by reason of their distinct scope, there exist some additional views and theories on how to deal with the issue of transfers of undertakings under the conflict of laws. The purpose of this paragraph is to assess the value of these theories and the effect they may have on the preferred choice of law method in the event of a cross-border transfer of undertaking.

### *7.1 Change in scope*

In solving the conflict of laws problems relating to cross-border transfers of undertakings one author proposes to change the scope of the Acquired Rights Directive. In her doctoral thesis, *Niksova* argues for the limitation of the Acquired Rights Directive and its national counterparts to domestic and intra-European transfers of undertakings. As such, she proposes that the undertaking to be transferred should be located within a European Member State both before and after the transfer. As such, she proposes the following change to Article 1(2) of the Acquired Rights Directive:

> *'Der Geltungsbereich dieser Richtlinie ist erfüllt, wenn sich das Unternehmen, der Betriebs oder der Unternehmens- bzw Betriebsteil, das bzw übergeht, vo rund nach dem Übergang in einem Mitgliedstaat befindet. Beim grenzüberschreitenden Übergang aus einem Mitgliedstaat in einem anderen Mitgliedstaat gilt das gem. Art. 8 Rom I-Vo anzuwendende Recht.'*[1099]

This provision, which is freely translated as 'the scope of the directive is fulfilled, whenever the undertaking, business or part of a business or undertaking to be transferred is situated within a Member State before and after the transfer; for a cross-border transfer from a Member State to another Member State the applicable law in accordance with Art. 8 Rome I Regulation is decisive', seeks to clarify that the application of the directive does not extend to inbound and outbound transfer scenarios. The proposed solution however does not solve all conflict of laws problems arising in relation to a cross-border transfer of undertaking nor does it do justice to the aim and purpose of the directive. In its present form, the Acquired Rights Directive applies to intra-European transfers and outbound transfers alike. This (extended) application to outbound transfers of undertakings already existed at the inception of the Acquired Rights Directive and in the earliest proposal of 1974. This is hardly surprising since the directive aims to protect all workers of European based undertakings upon a transfer of undertaking regardless of the destination of the transferred undertaking upon or immediately after the transfer.[1100] Employees that are affected by national or cross-border transfers of undertakings without relocation should not be better protected than those who are affected by a transfer of undertaking that is accompanied by a simultaneous or subsequent cross-border relocation.[1101] The idea of requiring the undertaking to be situated to a in a Member State both before and after the transfer is akin to the cumulative approach to the conflict of laws that is discussed above. Here too, the notion of employment protection, which lies at the heart of the Acquired Rights Directive, speaks against a cumulative application of the laws of transferee and transferor and

[1099] Niksova 2014, p. 107.
[1100] Proposal for a directive of the Council 'harmonisation of the legislation of Member States on the retention of the rights and advantages of employees in the case of mergers, takeovers and amalgamations', COM (74) 351 Final/2, p. 5, 18.
[1101] Bittner 2000, p. 487.

the requirement of being situated within a Member State both before and after the transfer. In this sense, it is inconceivable why employees should be deprived from the protection afforded by the Acquired Rights Directive and its national counterparts, simply because of the nationality of the transferee or location of the transferred undertaking upon or immediately after the transfer.[1102] Surely employees of European based undertakings should not be barred from (the application of) national acquired rights provisions simply because the undertaking in which they are employed is transferred to a non-Member State instead of a Member State. Allowing such application would defeat the entire purpose of the directive which is to safeguard the employees from a transfer of undertaking which is entirely beyond their control and influence. In addition to my reservations regarding a constriction of the Acquired Rights Directive, the connection to the conflict of laws category for individual employment contracts remains unsuited for a transfer of undertaking.[1103] Although an express provision in the Acquired Rights Directive does solve the problem of clearly establishing the proper conflict of laws regime and determining which national acquired rights provisions apply in a given case, it does not solve the problem of e.g. the *Amerikansiche Piloten*-case. Thus where both the choice of law and the objectively applicable law to the employment contracts do not point towards the laws of a Member State, even though the undertaking to be transferred is situated in a Member State both before and after the transfer the national acquired rights provisions of the Member State (and thus the directive) remain unapplied. More so, the connection to the individual employment contract and the habitual place of employment subjects the applicable law to change whenever the determination of that law is not fixed in time. A strict reliance on Article 8 Rome I Regulation will therefore result in a change of the applicable law upon the relocation abroad, a situation which is difficult to reconcile with the aim and purpose of the Acquired Rights Directive. The proposed conflict of laws solution should therefore be rejected.

[1102] Ebert 2008, p. 151; Bittner 2000, p. 487.

[1103] See below, paragraph 7 for an extended overview of my personal views in relation to a cross-border transfer of undertaking.

*7.2 Bündelungsmodell*

*Haanappel-van der Burg* proposes an alternate solution to the conflict of laws problems that arise in relation to cross-border transfers of undertakings that relies heavily on the *Bündelungsmodell* proposed by *Schurig.*[1104] The *Bündelungsmodell* critiques the existing distinction between multilateral and unilateral conflict of laws provisions.[1105] On the basis of this model every rule or norm can potentially be equipped with its own complementary conflict of laws provision. The essential and basic building blocks of this model are the so-called *Elementkollisionsnormen.*[1106] Every legal norm in every legal system is equipped with such a complementary conflict of laws norm, which is inevitably unilateral in nature: the *Elementkollisionsnorm* can only state when the legal norm in question (one distinct norm within one legal system) requires application. Multilateral conflict of laws provisions only come in to existence upon the bundling of legal norms that seek to regulate the same or similar substantive issues and underlie the same conflict of laws interests. This bundling may occur either horizontally or vertically. Horizontal bundling includes the coupling of multiple legal norms from different legal systems whereas vertical bundling refers to the coupling of national legal norms. The existence of corresponding conflict of laws interests is essential to the bundling of legal norms: once a legal norm enjoys a different conflict of laws purpose it cannot be bundled.[1107] These unbundled legal norms hold on to their complementary *Elementkollisionsnorm* and form unilateral conflict of laws provisions. In this, the existence of unilateral conflict of laws provisions does not imply a breach with the existing system of private international law that mostly relies on multilateral conflict of laws provisions. These unilateral conflict rules or overriding mandatory provisions only exists because their underlying substantive interests result in different conflict of laws interests that exclude the inclusion of these norms in an existing bundling or conflict of laws category.[1108] Drawing from the notion that the substantive purpose and

[1104] Schurig 1981, p. 89-108*;* Schurig 1990, p. 217-250.
[1105] *Cf. e.g.* Kuipers 2012*,* p. 142.
[1106] Mankowski 2012, p. 159.
[1107] Schurig 1990, p. 232; The interest and objectives of the legal norm or provision are only of secondary importance in the sense that they may influence the conflict of laws interest accompanying the legal norm. *Cf.* Fetsch 2002, p. 38; Kuipers 2012, p. 142.
[1108] Schurig 1990, p. 233.

objectives of individual norms under the *Bündelungsmodell* only play a marginal role in the bundling of legal norms and the conflict of laws classification, *Haanappel-van der Burg* argues that the issue of transfers of undertakings comprises a separate category under the conflict of laws.[1109] This argument is supported by the idea that the employee protective nature of the Acquired Rights Directive and the internal market objectives contained in the directive do not justify the conflict of laws classification seeking connection to the individual employment contract or as overriding mandatory provisions, since such connections are not justified by the conflict of laws interests underlying the Acquired Rights Directive.[1110] Under the separate conflict of laws category for transfers of undertakings connection is rightfully sought to the location of the undertaking or part of the undertaking or business. This undertaking forms the pivot of a transfer of undertaking and embodies the most natural connecting factor, an argument which is supported by the scope rule of Article 1(2) of the Acquired Rights Directive which, in the territorial application of the directive seeks connection to the location of the undertaking, business or part of the business or undertaking to be transferred.[1111] In deciding upon a separate conflict of laws rule or provision for transfers of undertakings for which a connection to the seat of the undertaking appears most suitable, *Haanappel-van der Burg* argues for a multilateral approach in intra-EU situations. Since the Member States all have an obligation to transpose the directive, their legislation is placed on equal footing. Drawing from the notions of the *Bündelungsmodell,* it is in intra-European situations that there exist similar or shared conflict of laws interests underlying substantively similar provisions, allowing for a bundling of the national acquired rights provisions of the Member States. Such bundling however, according to *Haanappel-van der Burg* cannot occur in relation to third states since these regularly do not inhabit any acquired rights provisions. She therefore argues for what she calls 'a unilaterally operating multilateral conflict of laws provision in relation to non-Member States.'[1112]

[1109] Haanappel-van der Burg 2015, p. 293; Haanappel-van der Burg 2016 I, p. 8; *Similarly*: Birk 1982, p. 396; Birk 1978, p. 291-292; Bittner 2000, p. 464 *et seq*; Junker 1992, p. 234 et seq.; Junker1994, p. 40; Reichold 2008, p. 697 *et seq.;* Henckel 2012, p. 389.

[1110] Haanappel-van der Burg 2015, p. 293

[1111] Haanappel-van der Burg 2016 I, p. 8; Haanappel-van der Burg 2015, p. 293-294.

[1112] Haanappel-van der Burg 2016 I, p. 9, she states that the multilateral reference rule operates unilaterally in relation to non-Member States – insofar as an EU law (obviously

This phrasing, which holds an inherent impossibility as multilateral conflict of laws provisions by their very nature cannot operate unilaterally, appears unintelligible. What she obviously intends to say is that she proposes two different conflict of laws approaches: a multilateral approach for intra-European transfer scenarios and a unilateral approach with respect to non-Member States, i.e. in outbound transfer scenarios. In essence, she proposes that, in relation to third states, Member State acquired rights provisions operate as overriding mandatory provisions on the basis of Article 9 Rome I Regulation.[1113]

I have two reservations to this proposal. First, the generalization of all non-Member States in relation to the bundling of their acquired rights provisions does not entirely stroke with the *Bündelungsmodell.* Surely the laws of most foreign states will not possess any provisions akin to those of the Acquired Rights Directive. However, there are those states that by drawing inspiration from the directive, e.g. Switzerland, South Africa or Aruba,[1114] have enacted laws that bear great similarity to the provisions of the directive. The laws of these states could therefore easily be horizontally bundled allowing for a multilateral conflicts of laws approach in their regard. The fact that the assessment of a horizontal bundling of the law of all states (and the continuing monitoring of legislation) would prove an insurmountable task surely makes the decision to give overriding effect to Member State acquired rights provisions in relation to third states understandable, but not however, justified. Such a decision of a unilateral application of Member States acquired rights provisions in relation to non-Member States can only be achieved via a rejection (or very limited application) of the *Bündelungsmodell.* My second reservation lies with the notion that in relation to third states, Member State acquired rights provisions are to operate as overriding mandatory provisions on the basis of Article 9 Rome I

meaning the law of an EU Member State) is held applicable: 'de meerzijdige verwijzingsregel functioneert dan slechts eenzijdig – voor zover een EU recht van toepassing wordt verklaard.'

[1113] Haanappel-van der Burg 2015, p. 295.

[1114] Art. 333 OR (*Bundesgesetz betreffend die Ergänzung des Schweizerischen Zivilgesetzbuches (Fünfter Teil: Obligationenrecht*) (Switzerland); Section 197 Labour Relations Act (No. 66 of 1995) (South Africa); Art. 1615da BWA *et seq.* (Aruba); In 2013 Aruba significantly modernised its employment law. One of the changes was the introduction provisions on transfers of undertakings modelled on Dutch law.

Regulation. Regardless of whether such application is even warranted, it cannot be achieved within the realm of the Rome I Regulation. By introducing a separate conflict of laws category for transfers of undertakings these types of legal relationships fall outside the Rome I Regulation.[1115] Certainly, one could, although the need for such approaches appears limited,[1116] operate different conflict of laws approaches in relation to Member States and non-Member States. If such differences in application are considered essential the proper place to make such distinction is within the special conflict of laws category and accompanying provision(s) existing for transfers of undertakings.

In light of the above, the theory and solutions proposed by *Haanappel- van den Burg* should, at least in part, be rejected. The same goes for her proposal not to fixate the determination of the connecting factor (i.e. the location of the undertaking) in time, thus giving rise to a change in law, i.e. *conflit mobile* or *Statutenwechsel,* upon the relocation of the transferred undertaking. Her justifications for not introducing such a temporal fixation lie partly in the wish to effectuate a rapid integration into the legal system of the state to which the undertaking has been transferred.[1117] Yet, the primary justifications are found in the classification of the obligations of the transfer for the transferee as open or continuing legal obligations.[1118] This distinction between open and closed legal obligations stems from transitional law, which is one of the areas of law that is occasionally drawn upon to solve a *conflit mobile.*[1119] There exist several views and ideas on how to remedy a

[1115] To my mind the issue of transfers of undertakings already falls outside the scope of the Rome I Regulation. The notion that the issue of transfers of undertakings falls outside the scope of the Rome I Regulation only applies to the extent that a separate conflict of laws category is enacted for which a provision is introduced outside the Rome I Regulation. If one would argue that a special conflict of laws provision for transfers of undertakings should be included into the Rome I Regulation my above reservation subsides.

[1116] See below para. 8.7.

[1117] Haanappel-van der Burg 2016 I, p. 9; Haanappel-van der Burg 2015, p. 295-296.

[1118] Haanappel-van der Burg 2015, p. 297; Haanappel-van der Burg 2016 I, p. 9.

[1119] In drawing from another area of law one must be mindful of the differences existing between these areas and the area of private international law. As such it should be borne in mind that transitional law neglects the international character of the '*conflit mobile'* or *'Statutenwechsel'*. Within private international law, the conflit mobile is a conflict between different national laws stemming from different national legislators resulting from a change in

*conflit mobile*, however if such a change does not occur there is no need for looking into its remedies. As such, the acceptance of a *conflit mobile* cannot be justified by its ensuing remedies. More so, the acceptance of a *conflit mobile* deviates from the scope of the Acquired Rights Directive which holds that the directive is applied 'whenever the undertaking *to be transferred* is situated within the territorial scope of the Treaty'.[1120] Here, the directive considers the geographic location of the undertaking *to be* transferred and not the location of the transferred undertaking to be decisive.

**8. Preferred choice of law method**

Reiterating the introduction to this Chapter, the ultimate aim of this Chapter is to assess and identify the present conflict of laws regime in relation to cross-border transfers of undertakings and to determine whether this regime should be upheld or is in need of revision. As appears from the previous paragraphs, there exist various views and ideas on how to deal with the issue of transfers of undertakings on a conflict of laws level. These views not only differ where it concerns the preferred choice of law method, but also where it concerns the existing conflict of laws application. As is apparent from preceding paragraphs many of these views are inconsistent with the aim and purpose of the Acquired Rights Directive and do not do justice to the rights that the directive seeks to ensure. This paragraph recognizes the inadequacy of the existing conflict of laws regime and many of the views and theories proposed as a solution to the enduring conflict of laws problems. In this, it will provide a digression of the conflict of laws solution I believe is best equipped to solve the existing conflict of laws problems relating to cross-border transfers of undertakings.

*8.1 Effectiveness of existing legal instruments*

On a conflict of laws level, both the Rome I Regulation and the Acquired Rights Directive itself may be of value in determining the applicable law to a cross-border transfer of undertaking. Under the prevailing opinion, by seeking connection to the individual contract of employment, the Rome I

the location of the object to which connection is sought under the conflict of laws. More so, the *conflict mobile* involves a conflict between two laws that are equally applicable and in force, instead of referring to the a conflict between a law that is repealed an one that is applicable.

[1120] Art. 1(2) Acquired Rights Directive.

Regulation, more specifically Article 8 of the Rome I Regulation, is to decide on the law that governs a transfer of undertaking. In doing so, the idea that a transfer of undertaking as a separate legal concept falls outside the scope of the Rome I Regulation is often overlooked.[1121] After all, all rights and obligations stemming from a transfer of undertaking are effectuated by operation of law rather than the result of contractual dealings. More so, the provision existing for individual employment contracts appears ill-equipped to deal with the more collective aspects of a transfer of undertaking and the determination of the applicable law may, at times, be difficult and constitute a lengthy process.[1122] The connection to this conflict of laws category thus results in several problems and ambiguities in relation to a transfer of undertaking. For instance, a strict application of the conflict of laws provision for individual employment contracts results in a change of law upon the relocation of the undertaking abroad, which is incompatible with the aim and purpose of the Acquired Rights Directive and its national counterparts.[1123] In addition, there exists considerable uncertainty on whether national acquired rights provisions may be applied as overriding mandatory provisions on the basis of Article 9 of the Rome I Regulation whenever the connection to the individual employment contract does not point towards the laws of a Member State despite the case at hand falling within the scope of the Acquired Rights Directive. It is the ambiguity of the scope of the Acquired Rights Directive and the distinct scope rule of Article 1(2) that adds more fuel to the fire when it comes to assessing the proper conflict of laws path for transfers of undertakings. Due to its indistinctness the Member States have attributed different meanings to the scope rule of Article 1(2), with some Member States having ascribed conflict of laws implications to this particular provision. As such, there are Member States that deviate from the prevailing opinion that a transfer of undertaking is to be assimilated under the conflict of laws category for individual employment contracts. In this sense the United Kingdom, Malta and Luxembourg have imposed a unilateral conflict of laws provision seeking connection to the location of the undertaking to be transferred,[1124] thus establishing a separate conflict of laws

[1121] See above, para. 4.1 of the present Chapter.

[1122] See above, para. 4.3 of the present Chapter.

[1123] See below, paragraph 8.5.

[1124] These countries all apply their national acquired rights provisions whenever the undertaking *to be* transferred is situated within their territory.

connection for transfers of undertakings. All in all, the existing conflict of laws regime for transfers of undertakings is plagued by false assumptions, ambiguities and disparities which is only exacerbated by the different approaches of the Member States.

*8.2 Separate conflict of laws category*

The issue of transfers of undertakings falls outside the scope of the Rome I Regulation and has difficulty being applied merely on the basis of the scope rule existing in Article 1(2) of the Acquired Rights Directive. Since this scope rule stems directly from the directive it may only be applied to the minimum level of protection offered therein. More so, the scope rule requires unilateral application whenever the undertaking to be transferred is situated within the territory of a Member State; it does not directly determine which national acquired rights provisions are to apply in a given case. More so, as the directive itself is not directly applicable to private parties, there exists a need for determining when national acquired rights provisions are to apply and which national acquired rights provisions are to apply in a particular case. A way to secure such application is by limiting the application of national acquired rights provisions to national territory as was done in the United Kingdom, Malta and Luxembourg.[1125] However, there exist certain inherent limitations to the application of these provisions. Due to their unilateral nature it is left undetermined which law is to be decisive in the event that a situation falls outside the ambit of the particular scope rule. Any conflict of laws provision for transfers of undertakings is therefore best served with a multilateral nature. A transfer of undertaking, which secures both collective and individual employment interests as well as inhabits certain internal market considerations, is to be subjected, as a whole, to a single law. In my belief, the issue of transfers of undertakings as such constitutes an independent reference category under the conflict of laws for

[1125] Art. L. 127-1 (2) Code du Travail Luxembourg;; Art. 3(1)(d) Transfer of Business (Protection of Employment) Regulations, *S.L.* 452.85: Art. 3(1)(a) the Transfer of Undertakings (Protection of Employment) Regulations 2006, *S.I.* 2006 no. 246 (as amended by The Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014, *S.I.* 2014 No. 16).

which connection is to be sought to the seat of the undertaking to be transferred.[1126]

*8.3 Choice of law*

Party autonomy forms one of the cornerstones of modern private international law and allows the parties to subject their contractual dealings to a specific system of law, thus ensuring legal certainty.[1127] Nevertheless, the issue of transfers of undertakings, which is not primarily a contractual issue since it occurs by operation of law, appears incompatible with a *professio iuris.*[1128] It is the employee protective nature of the Acquired Rights Directive and its national counterparts that resists such a choice. The primary purpose of a transfer of undertaking is to, upon a transfer, secure the transfer (and continuance) of the acquired rights of the employees affected by the transfer. It should not be possible to negate the fulfillment of this aim by way of a choice of law, bypassing the application of the Acquired Rights Directive and its national counterparts. After all, by reason of a mere choice of law, the parties would be able to circumvent mandatory provisions of employment law, such as those transposing the Acquired Rights Directive, and prevent the affected employees from transferring to the transferee. Thus, allowance of a *professio iuris* bears the risk that the employees will be deprived of the protection afforded to them by the Acquired Rights Directive and its national counterparts. For this very reason the conflict of laws reference in matters relating to a cross-border transfer of undertaking should not inhabit the possibility of a choice of law.[1129] In this it is unimaginable

[1126] *Cf.* Below paragraph 8.4; Henckel 2012, p. 389; This idea is shared by Haanappel-van der Burg 2016 I, p. 8 *et seq*.

[1127] *Cf. e.g.* Flessner & Verhagen 2006, p. 21; Rühl 2007.

[1128] This view is aided by a decision of the EFTA court in which it held that: 'the purpose of the Directive is to ensure that the rights arising from a contract of employment or employment relationship of employees affected by the transfer of an undertaking are safeguarded. Since this protection is a matter of public policy, and therefore independent of the will of the parties to the contract of employment, the rules of the Directive must be considered to be mandatory, so that it is not possible to derogate from them in a manner unfavourable to employees. It follows that employees are not entitled to waive the rights conferred on them by the Directive and that those rights cannot be restricted even with their consent.' (Case E3/95 *Torgeir Langeland v Norske Fabricom A/S* [1995-1996] *EFTA Ct. Rep.* 36, para. 42-43)

[1129] *Cf.* Gamillscheg 1959, p. 237; Gamillscheg 1983, p. 359; Junker 1992, p. 233; Pietzko 1988, p. 216; Kronke 1981, p. 159; Kronke 1989, p. 9*;* Mankowski 1994, p. 96; Kania 2012,

that the transferor and transferee should be able to choose the law that will govern the effects of the transfer in relation to the existing employment contracts or relationships without the knowledge or consent of the affected employees.[1130] The application of national acquired rights provisions, should not be dependent upon a unilateral decision of the transferee and transferor. In essence, the mere fact that the employees cannot in any way influence such a choice of law makes that they as weaker parties are deserving of protection. To this end the interests of the affected employees outweigh those of the transferee.[1131] Thus the possibility of a choice of law by the transferor and transferee should be rejected. The same goes for a *professio iuris* that is a consequence of contractual dealings between the transferor/transferee and the affected employees.[1132] They too should not be able to themselves determine the law that will govern the transfer of undertaking. After all, there generally exists an inequality in bargaining power between the employee and his employer, allowing for a circumvention of national acquired rights provisions to be imposed upon the affected employees. Thus, in essence, any specific conflict of laws regime for transfers of undertakings should exclude party autonomy.

*8.4 Connecting factor*

In determining the law that applies to a transfer of undertaking connection should be sought to the location of the undertaking (to be transferred) as this embodies the most natural connecting factor.[1133] Not only does the undertaking form the pivot of the Acquired Rights Directive, Article 1(2) of the directive attributes special meaning to the seat of the undertaking by causing the directive to apply 'where and in so far as the undertaking, business or part of the undertaking or business to be transferred *is situated*

p. 82-83, Franzen 1994, p. 70; Däubler 1994, p. 124; Niksova 2014, p. 70-71; Bittner 2000, p. 460, footnote 20; Richter 1992, p. 70; Drobnig, Becker & Remien 1991, p. 68.

[1130] Kania 2012, p. 83; Richter 1992, p. 68; Haanappel-van der Burg, 2016 I, p. 8.

[1131] Niksova 2014, p. 71; Kania 2012, p. 83; Däubler 1994, p. 124.

[1132] Meaning e.g. a tripartite agreement that expressly covers the issue of transfers of undertakings and not contractual dealings under Article 8 Rome I Regulation (after all, the issue of transfers of undertakings falls outside the realm of the Rome I Regulation).

[1133] *Cf.* Bittner 2000, p. 464 *et seq.*; Junker, 1992, p. 234 *et seq.*; Junker, 1994, p. 40; Birk 1982, p. 396; Reichold 2008, p. 697 *et seq*.; Birk 1978, p. 291-29; Henckel 2012, p, 389; Haanappel-van der Burg 2015, p. 293; Haanappel-van der Burg 2016 I, p. 8; *Cf.* Laagland 2011, p. 17; Junker 2012, p. 13.

within the territorial scope of the Treaty'.[1134] The Acquired Rights Directive revolves around the undertaking to be transferred and the effects of this transfer upon the affected employees. More so, the effects of a transfer of undertaking are not confined to the individual employment relationship, but also concern operational, economic and collective employment interests.[1135] Keeping these additional effects in mind, the individual contract of employment forms an ill-suited connecting factor. A connection to the individual contract of employment not only ignores the aim and purpose of the directive, which lies in the protection of individual and collective employment rights as well as in internal market considerations, it also requires a, possibly lengthy assessment of seeking the habitual place of employment or failing that the location of the business through which the employee was engaged.[1136] By comparison the geographic location of the undertaking to be transferred is easily determined. Still, the dichotomy between the law that applies to the employment contract and the law of the location of the undertaking to be transferred as possible connecting factors for the transfer of undertaking will generally not yield different results.[1137] Indeed, the habitual place of employment, which is the general connecting factor in determining the law that applies to the individual employment contract, will result in the application of the law in force at the location of the undertaking as the majority of employees is likely to habitually perform

[1134] Emphasis added KCH.

[1135] Bittner 2000, p. 464; Birk 1982, p. 396; Haanappel-van der Burg 2015, p. 290.

[1136] *Cf.* Article 8 Rome I Regulation. Such a lengthy assessment will mostly take place where it concerns undertaking with a high level of mobility or an undertaking that is already geared towards several countries including the one in which it is situated. These type of undertakings may embody a larger number of cross-border transfers when compared to undertakings that that are solely conducting their business within one single country. Still, in most cases the employees of the undertaking to be transferred will habitually carry out their employment at the location of the undertaking to be transferred, allowing no difference between the application of the law that applies to the individual contract of employment and the laws in force at the seat of the undertaking to be transferred.

[1137] Where there does exist a difference in the law governing the employment contract and the law governing the transfer of undertaking such difference does not pose any problems. After all, the transfer of undertaking is an area of law that can be separated as a whole from the general body of employment law. As such there exists no overlap and therefore no conflict between the rules of employment law covered by the choice of law in the employment contract and the rights and obligations stemming from a transfer of undertaking.

their employment at the location of the undertaking to be transferred.[1138] However, a major advantage of the proposed connecting factor and one of the primary reasons to discard the connection to the individual contract of employment lies in the impossibility to make a choice of law in seeking connection to the location of the undertaking to be transferred. As stated above, party autonomy is inconsistent with the very nature of the Acquired Rights Directive and the automatic transfer of the existing employment relationships to the transferee. The parties should not be able to, by means of a choice of law, negate the application of the acquired rights provisions in force at the location of the undertaking to be transferred, as this location, as demonstrated by Article 1(2), is essential to the application of the Acquired Rights Directive. More so, a connection to the location of the undertaking to be transferred would prevent a fragmentation of the laws that apply to the workforce. It is this connection that ensures that the entire workforce is subject to the same national acquired rights provisions, thus giving full effect to the Acquired Rights Directive by preventing that only part of the workforce is transferred to the transferee.[1139] A connection to the seat of the undertaking marks the application of a neutral connecting factor that is closely connected to the transfer of undertaking itself. It is the transfer of the undertaking itself that forms the nexus of a transfer of undertaking, thus justifying the conflict of laws connection to the geographic location of the undertaking to be transferred.[1140] More so, as stated above, the Acquired Rights Directive, in Article 1(2), attributes special meaning to the seat of the undertaking by applying the directive 'where and in so far as the undertaking, business or part of the undertaking or business to be transferred *is situated* within the territorial scope of the Treaty'[1141] Thus, the wording of this provision aides the notion that the situation or location of the undertaking to be transferred holds considerable meaning for the conflict of laws. As such, the seat of the undertaking to be transferred forms the preferred connecting factor under the conflict of laws.

[1138] Junker 2012, p. 13.
[1139] Niksova 2014, p. 72; Bittner 2000, p. 464. This notion is somewhat undercut by the preferential law approach enshrined in Article 8(1) Rome I Regulation.
[1140] Niksova 2014, p. 72; Junker 1992, p. 235.
[1141] Emphasis added KCH.

*8.5 Temporal fixation*

In seeking connection to the location of the undertaking (to be transferred) the applicable law should be fixed to the location of the undertaking upon or immediately prior to the transfer.[1142] As such, in determining the applicable law to a transfer of undertaking, the time or date of the transfer is a factor of great importance; this is the time at which the employee relationships existing with the transferor will transfer to the transferee.[1143] Unlike the individual employment contract, this transfer is not subject to continuity as it occurs by operation of law at a set moment in time.[1144] A failure to impose a temporal fixation of the determination of the preferred connecting factor, i.e. the location of the undertaking to be transferred, would result in the emergence of an unwarranted *conflit mobile* upon the relocation of the transferred undertaking. Allowing such a *conflit mobile* or change in the law that governs a transfer of undertaking coinciding with the moment that the undertaking is transferred abroad does not do justice to the nature of a transfer of undertaking, which is fixated at a particular time. More so, allowing a change in the applicable law to a transfer of undertaking would defeat the entire purpose of the Acquired Rights Directive as it would result in the transfer only having some effect if the laws at the original location and the new location of the undertaking (depending on the time of the relocation) allow for an automatic transfer of the employment relationship and the rights and obligations stemming therefrom. Such a cumulative application of laws is contrary to both the aim of the Acquired Rights Directive, which is to safeguard the rights of employees employed in European based undertakings and Article 1(2) of the directive. Article 1(2) merely requires the

[1142] In establishing a conflict rule determining the applicable law to any legal relationship the conflict of laws connection generally consists of three elements: a subject (transfer of undertakings), an attribute of this subject (location of the undertaking to be transferred) and a time of determination: See Kropholler 1990, p. 115.

[1143] Another argument against the change in applicable law may be found in the similarity to the conflict of laws assessment of contract acquisition or the assignment of debts, which is utilized as a justification for the assimilation of transfers of undertakings under the conflict of laws category of employment contracts. Under the conflict of laws assessment of contract acquisition the transfer of a contract is governed by the law that governs the contract itself. This law continues to be decisive after the transfer.

[1144] It this context it should be noted that the rights and obligations stemming from a transfer of undertaking, although occurring *ope legis* at a set moment in time may have a continuing effect of the existing employment relationship.

undertaking, *to be transferred* to be located within an EU Member State prior to the transfer. Thus, as appears from the directive, its application is exclusively dependent on the geographical location of the undertaking *to be transferred* and not on the destination of the undertaking upon or after the transfer. In the protection of employees there should not exist a distinction between domestic, intra-European and outbound transfer scenarios. The conflict of laws may not be utilised to thwart the application of the Acquired Rights Directive, which applies to intra-European and outbound transfers alike. There is no reason why an employee should be deprived from the application of the Acquired Rights Directive or its national counterparts when an undertaking is transferred to a state that does not make provision for the transfer of acquired rights. Employees that are affected by national or cross-border transfers of undertakings without relocation should not be better protected than those who are affected by a transfer of undertaking that is accompanied by a cross-border relocation.[1145] Surely, in situations involving a transfer of undertaking that is accompanied by a cross-border relocation of that undertaking a swift integration into the legal system of the state to which the undertaking has been transferred is desired.[1146] Such integration may come to pass by a change in the law that applies to the individual employment contract, which is to be distinguished from the law that applies to the (effects of) a transfer of undertaking. Upon the relocation of the transferred undertaking the applicable law to the individual contract of employment is likely to change due to a change in the objective connecting factor of the habitual place of employment. However, a change in the law that governs (the effects of) a transfer of undertaking would defeat the entire aim and purpose of the Acquired Rights Directive and should be rejected for that very reason. After all, it is imperative that the conflict of laws allows the full application of the Acquired Rights Directive and its national counterparts. There are several means by which a *conflict mobile* may be forfended, most notably by a temporal fixation of the conflict of laws connection and the allowance of party autonomy, i.e. a *professio iuris*.[1147] Surely the applicable law to a transfer of undertaking would be immutable if that law were established by means of party autonomy. The employee

[1145] *Cf.* Bittner 2000, p. 487.
[1146] *Cf.* Haanappel-van der Burg 2016 I, p. 9; Haanappel-van der Burg 2015, p. 295-296.
[1147] Van Hoek 2000, p. 67; d' Haeyer 2009, p. 108.

protective nature of the Acquired Rights Directive however prevents the allowance of a choice of law. Thus there remains the temporal fixation of the conflict of laws connection as a means to prevent a *conflit mobile.* Once the conflict of laws norm imposes a temporal fixation on the (determination of the) conflict of laws connection that connection and the ensuing applicable law become immutable.[1148] Once the conflict of laws connection for transfers of undertakings is fixated in time a *conflit mobile* is averted and there exists no need to explore the remedies of such a conflict.[1149] The conflict of laws connection for transfers of undertakings is therefore to be inescapably fixated in time by applying the law of the country in which the undertaking to be transferred is situated upon or immediately prior to the transfer. This connection reflects the nature and aim of the Acquired Rights Directive by securing the continued application of the acquired rights provisions in force at the place from which the transferred undertaking originates, generally coinciding with the employees' (original) working environment. More so, this connection is in line with or even equates to the scope rule of Article 1(2) of the Acquired Rights Directive and the legislation of the United Kingdom, Luxembourg and Malta, which, although unilaterally, all seek connection of to the location of the undertaking *to be transferred*.

*8.6 Overriding effect of provisions exceeding minimum protection*

Since the Acquired Rights Directive offers minimum protection to the employees affected by a transfer of undertaking the Member States are free to exceed this protection.[1150] A Member State may extend the scope of its acquired rights provisions, the level of protection it offers or utilize the options provided by the directive by extending the application of national acquired rights provisions to e.g. insolvent undertakings or supplementary old-age, invalidity or survivor's benefits. Whereas the law of the Member States in relation to the minimum protection offered by the directive are placed on equal footing, leaving no room for their overriding effect in relation to the laws of other Member States, national acquired rights

[1148] Looschelders 2004, p. 35; Rauscher 2009, p. 106-107; Henrich 2010, p .289.

[1149] *Contra* Haanappel-van der Burg 2015, p. 295-296 who argues against a temporal fixation of the conflict of laws connection upon a transfer of undertaking, which she considers unjustified on the basis of certain arguments that are based in the remedies for a *conflit mobile.*

[1150] See Article 8 Acquired Rights Directive.

provisions that are more favourable to employees may be considered to have overriding mandatory effect. Thus if the application of national acquired rights provisions of exceeding protection is considered essential according to the general structure and circumstances under which the law was adopted[1151] they may have an overriding effect on the *lex causae.* Since the issue of transfers of undertakings falls outside the scope of the Rome I Regulation, there exists no European limitation on the application of foreign overriding mandatory provisions.[1152] As such, it remains left to the private international law of the Member States to determine to which extent such provisions are to be taken into account. Although it is unlikely that such application is readily assumed, in relation to the overriding application of provisions exceeding the minimum protection offered by the Acquired Rights Directive one reflection should be considered. From a theoretical perspective there exists a strict dichotomy between provisions transposing the directive and provisions that exceed the protection awarded by the directive. From a practical standpoint however these provisions are not always as easily separated. It may be that the provisions of exceeding provision are entangled with the provisions of minimum protection to such an extent that parting them would be unmanageable, especially when they are part of a single legal provision. In situations where the exceeding protection awarded by the Member States results from a variety of options offered by the directive itself it seems peculiar that these provisions would be subject to a different conflict of laws regime than the provisions transposing the directive. To that extent the application of national provisions of exceeding protection may be dovetailed with the application of the provisions effectuating minimum protection.

*8.7 Proposed conflict of laws provision*

It is thus established that there should exist a separate conflict of laws category for transfers of undertakings under which connection is to be sought to the location of the undertaking to be transferred. In determining the exact content and wording of such a conflict of laws provision a multilateral approach appears most desirable. In this sense, the conflict of laws rule

[1151] *Cf.* Case C-184/12 *Unamar* [2013] ECLI:EU:C:2013:663, para. 50.

[1152] Article 9(3) severely limits the application of the overriding mandatory provisions of any state other than the *lex fori.*

should establish the law that governs (the effects of) a transfer of undertaking rather than determine the territorial reach of national acquired rights provisions, leaving the applicable law beyond this reach to remain undetermined. Especially at a European level, in intra-European transfer scenarios, there is no need for a unilateral approach to the conflict of laws.[1153] After all, the legislation of all Member States, by reason of the minimum protection afforded by the Acquired Rights Directive, is equipped with national acquired rights provisions. When it comes to employee protection, the Member States thus share certain rights and values. Such values and acquired rights provisions may not be shared with third states, which could potentially justify a different conflict of laws approach in their regard. Here, the question becomes whether there is a need for a difference in the preferred conflict of laws approach between domestic, intra-European and outbound transfers scenarios. Since the Acquired Rights Directive applies to intra-European and outbound transfers alike the conflict of laws connection should ensure such application. After all, the underlying idea that all those employed in EU-based undertakings are protected upon the transfer of the undertaking in which they are employed should be guaranteed. Since the employees cannot exert any influence over the change in their employer they require a protection of their interests and the rights and obligations stemming from their employment contract. In this, the location of the undertaking after (completion of) the transfer should remain immaterial. The fact that the directive encompasses transfers of undertakings to non-Member States will, on occasion, undoubtedly result in the laws of the country of the transferee not being equipped with (similar) acquired rights provisions. This however should not prevent the employees of EU-based undertakings from being entitled to the protection of their rights and obligations, especially since, as stated above, they themselves cannot exert any influence on the location of the transferred undertaking after the transfer. The existence of acquired rights provisions in the country of destination therefore does not form a requirement for the application of the Acquired Rights Directive and its national counterparts. More so, the issue of enforcement of Member State law in non-Member States should have no bearing on the conflict of laws

[1153] *Cf.* Ten Wolde 2011.

and the determination of the appropriate conflict of laws path.[1154] This issue is the exclusive purview of the area of private international law that is concerned with the recognition and enforcement of foreign judgments. The most important factor in determining the application of the Acquired Rights Directive and, more so, its national counterparts is the location of the undertaking to be transferred. As such the preferred conflict of laws reference for transfers of undertakings should read:

> 'a transfer of undertaking shall be governed by the law of the Member State in which the undertaking to be transferred is situated upon or immediately prior to the transfer.'

This reference secures the application of the acquired rights provisions of a Member State whenever the undertaking to be transferred is situated within EU territory. By doing so, it complements the scope rule enshrined in Article 1(2) of the Acquired Rights Directive. In essence, the national acquired rights provisions of the legal environment from where the undertaking originates apply and remain applicable after the transfer of undertaking has come into effect.[1155] The same does not apply to undertakings situated in non-Member States. Since the scope of the Acquired Rights Directive is

[1154] In some cases the enforcement of Member State acquired rights provisions in non-Member States may not be an issue as the transferee may willingly subject to such law. For example in the UK case of *Holis*, involving a transfer from the United Kingdom to Isreal, Judge Ansell argued in this regard:

> 'I accept that enforcement may present a problem although I accept Mr Siddall's argument that enforcement can present a problem even within the EU. In these days of multi-national corporations and economic interdependency I would regard the issue of enforcement as less difficult then it used to be – witness the willingness of Holis to submit to the jurisdiction in this case.'

Here the judge obviously felt that the willingness of the transferee to submit to the jurisdiction of a foreign court presumed an equal willingness to comply with the judgment by this court and as such a willingness to comply with the application of the United Kingdom's acquired rights provisions (It is noteworthy that this case the existence of a transfer of undertaking was not in dispute),. Although I do not agree with the judge's underplay of the importance of issues of enforcement, these issues do not pose a problem if the transferee voluntarily complies with Member State law.

[1155] In this it should be noted that the interpretation of the proposed provision should include situations where the undertaking is transferred abroad prior to the transfer of undertaking in order to purposefully circumvent the application of acquired rights provisions.

limited to intra-European and outbound transfer scenarios, any conflict of laws provision enclosed in the directive is subject to such scope. As such, inbound transfers, i.e. transfers from a non-Member State to an EU Member State, are beyond the scope of the proposed conflict of laws provision. It seems to me that there is no need to complicate the conflict of laws reference by applying a different conflict of laws approach where it concerns inbound transfer scenarios, i.e. transfers from a non-Member State to a Member State. Not only would such a provision be superfluous, it would openly conflict with the scope of the Acquired Rights Directive. The Member States are however free to impose, in their national laws, a similar rule with regard to inbound transfer scenarios.[1156]

[1156] If they were to do so, an inbound transfer would be subject to the laws of a non-Member State. Affording the affected employees the protection of the undertaking's state of origin.

# Chapter 5 – Seafaring workers

## 1. Introduction[1157]

Determined to reclaim Europe's seafaring heritage, the European Union, in 2007, established an integrated maritime policy through the so-called Blue Book.[1158] This policy is aimed at increasing the competitiveness of the European shipping industry and enhancing the employment of European seafaring workers. In order to fulfill the objective of increasing employment throughout the maritime sectors the Commission revealed its intention to 'reassess, in close cooperation with social partners, the exclusions effecting maritime sectors in EU labour legislation'.[1159] This call for reassessment found its basis in the 2006 Green Paper 'Towards a future Maritime Policy for the Union'[1160], which had already identified the exclusion of the maritime sector from European labour and social legislation.[1161] Regardless of the reasons underlying these exclusions, seafaring workers should be able to enjoy the same level of protection as land-based workers where appropriate.[1162] Dedicated to the improvement of the European social dimension and ensuring a level playing field for maritime employees, the European Commission launched a first phase consultation of social partners[1163] concerning the reassessment of the position of seafaring workers

[1157] This Chapter partly corresponds to an Article published in the journal *Nederlands Internationaal Privaatrecht:* K.C. Henckel, 'Conflict of laws and the Acquired Rights Directive: the cross-border transfer of seagoing vessels', *NIPR* 2012, p. 376-389.

[1158] COM (2007) 575 final.

[1159] COM (2007) 575 final, p. 9; *Cf.* COM (2012) 494 final.

[1160] Green Paper 'Towards a future Maritime Policy for the Union: A European vision for the oceans and seas', COM(2006) 275 final.

[1161] *Ibid.*, p. 21; the Green Paper also called for the reassessment of this legislation in close cooperation with social partners.

[1162] Opinion of the European Economic and Social Committee on the Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of Regions – Towards a future Maritime Policy for the Union: a European vision for the oceans and the seas, TEN/255 – CESE 609/2007 fin, under 1.7; European Parliament resolution of 11th July 2007 on modernising labour law to meet the challenges of the 21st century, 2007/2023(INI), under 19.

[1163] COM(2007) 591 final.

within six directives in 2007.[1164] Among the directives reviewed is the Acquired Rights Directive.[1165] After completing the first phase consultation the Commission launched a second phase consultation in 2009[1166] and issued a proposal for a directive on seafarers in 2013, aiming to remove the exclusion of seagoing workers from several European social directives, including the Acquired Rights Directive.[1167] In its proposal the Commission offers a repeal of Article 1(3) of the Acquired Rights Directive, which excludes seagoing vessels from the scope of the directive. In this proposal, the directive is made to apply to the transfer of seagoing vessels that are registered in or fly the flag of a Member State regardless of their geographic location at the time of the transfer.[1168] In addition, the directive is to offer the Member States the option to apply their national acquired rights provisions to single vessel transfers. By doing so, it appears that seagoing workers are

[1164] Directive 2002/74/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 80/987/EEC on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer, *OJ* 2004, L 270/10; Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees, *OJ* 1994, L 254/64; Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community – Joint declaration of the European Parliament, the Council and the Commission on employee representation, *OJ* 2002, L 80/29; Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies, *OJ* 1998, L 225/16; Council Directive (EC) 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, *OJ* 2001, L 82/16 and Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, *OJ* 1996, L 18/1.

[1165] COM(2007) 591 final, p. 12.

[1166] Reassessing the regulatory social framework for more and better seafaring jobs in the EU: Second consultation of the European social partners on the revision of exclusions concerning seafaring workers contained in Directives 2008/94/EC, 94/45/EC, 2002/14/EC, 98/56/EC, 2001/23/EC and 96/71/EC [2009] available online at: <ec.europa.eu/social> <search: seafaring> <no. 3>.

[1167] Proposal for a directive of the European Parliament and of the Council on seafarers amending Directives 2008/94/EC, 2009/38/EC, 2002/14/EC, 98/59/EC and 2001/23/EC, COM (2013) 798 final.

[1168] Unclear whether this reference to the state of registration and the flag state involves the undertaking or seagoing vessel to be transferred, as is the case with land-based undertakings.

to enjoy a position equal to that of land-based workers and crews of inland navigation vessels.[1169] In 2015, following an agreement reached in trialogue,[1170] a revised directive on seafarers, amending several social policy directives including the Acquired Rights Directive, was adopted.[1171] This directive amends the scope of the Acquired Rights Directive by repealing Article 1(3) and including seagoing vessels that are part of a transfer of undertaking within the scope of the directive. This inclusion is made dependent upon the location of the transferee or the location of the undertaking upon completion of the transfer. In addition, the application of the directive is precluded where 'the object of the transfer consists exclusively of one or more seagoing vessels.'[1172]

The primary aim of the present Chapter is to discuss the merits of the new directive where it concerns transfers of undertakings. In this, an important question is whether the change in the scope of the Acquired Rights Directive holds any implications for the conflict of laws and deserves a revision of or addition to the conflict of laws rule proposed in the previous Chapter in so far as it concerns seagoing vessels. This proposed provision reads:

> 'a transfer of undertaking shall be governed by the law of the country in which the undertaking to be transferred is situated upon or immediately prior to the transfer.'

Thus, the purpose of this Chapter is to establish whether the special characteristics of the maritime sector, its inherent cross-border and international features, combined with the recent revision of the Acquired Rights Directive, give rise to a special conflict of laws consideration of seagoing vessels in relation to transfers of undertakings. The global nature of

[1169] See e.g. Rb. Dordrecht 24 April 1996, *JAR* 1996/198, ECLI:NL:RBDOR:1996:AM1891.
[1170] *Cf.* Committee on Employment and Social Affairs, Draft report on the proposal for a directive of the European Parliament and of the Council on seafarers amending Directives 2008/94/EC, 2009/38/EC, 2002/14/EC, 98/59/EC and 2001/23/EC (COM(2013)0798 – C7-0409/2013 – 2013/0390(COD)), p. 15.
[1171] Directive (EU) 2015/1794 of the European Parliament and of the Council of 6 October 2015 amending Directives 2008/94/EC, 2009/38/EC and 2002/14/EC of the European Parliament and of the Council, and Council Directives 98/59/EC and 2001/23/EC, as regards seafarers, *OJ* [2015] L 263/1.
[1172] Article 5 Directive (EU) 2015/1794.

the shipping industry and the fierce competition therein coupled with its inextricable link to maritime transport make that the transfer of seagoing vessels, by means of sale or charter, forms an everyday activity in international shipping. Ships are transferred between shipping companies on a global scale. Time and again such transfers are coupled with a simultaneous or subsequent reflagging of the vessel.[1173] Many legal systems may be connected to a single vessel transfer, such as the legal system of (the state of nationality, location or incorporation of) the transferor, transferee, former flag state, subsequent flag state, the vessel's place of registration prior to and after the transfer and so on. For this reason it is important to establish which regulatory regime applies to the transfer and its effects. As international transfers of ships and fleets are commonplace in today's globalised economy, it is vital to establish whether the inclusion of seagoing vessels into the Acquired Rights Directive requires a revision of the conflict of laws rule for transfers of undertakings proposed in the previous Chapter.

## 2. Inclusion of seagoing vessels

In its former Article 1(3), the Acquired Rights Directive explicitly excluded seagoing vessels from its scope of application. This exclusion pertained only to the transfer of single vessels and did not extend to the transfer of shipping companies and undertakings including, *inter alia*, a seagoing vessel.[1174] The rationale behind the exclusion remains unclear as it was already part of the original directive of 1977 and neither the initial proposal of 1974[1175] nor the

[1173] In order to maintain the overall competitiveness of the European fleet on world markets and to protect and promote employment for European seafarers, the European Commission is encouraging the reflagging to Member State's registers: Commission Communication C(2004)43 – Community guidelines on State aid to maritime transport, OJ [2004] C 13/5; Report of the Task Force on Maritime Employment and Competitiveness and Policy, Recommendations to the European Commission, 2011, p. 5, available online at: <http://ec.europa.eu/transport/maritime/seafarers/seafarers_en.htm>. In its report, the taskforce additionally stresses the importance of the repeal of the provision excluding seagoing vessels from the scope of the Acquired Rights Directive.

[1174] *Kamerstukken II* (Parliamentary papers) 1979/80, 15940, no. 3, p. 5 (MvT); *Kamerstukken II* 1979/80, 15940, no. 7, p. 3 (MvA): '*De uitzondering omvat niet tevens de onderneming (rederij) welke een zeeschip exploiteert*'; *Kamerstukken II* 1979/80, 15940, no. 5, p. 3; Christe 2010 (*Arbeidsrecht*), Art. 7:666 BW, note 3; Drobnig & Puttfarken 1989, p. 74, 77.

[1175] COM(74) 351.

amended proposal of 1975[1176] specifically mentioned the maritime sector.[1177] The international particularities of maritime navigation, i.e., the heightened mobility of seagoing vessels and the global competitiveness of the maritime sector, may have prompted the exclusion.[1178] Efforts by the European Commission to reverse the exclusion in 1994 proved futile.[1179] In its proposal for the revision of directive 77/87/EEC the Commission considered the provisions of the directive to be 'in no way incompatible with the special nature of the contract of employment or employment relationships of crews of seagoing vessels'. Considerations of flexibility were thought to justify the exclusion of seagoing vessels from the scope of the section concerning information and consultation, but not from other, more fundamental, provisions of the directive.[1180] Even though seagoing vessels, until recently, remained excluded from the Acquired Rights Directive, the directive did not prevent its national counterparts from excluding workers in the seagoing professions.[1181] Since Article 8 of the directive allows the introduction of national laws that are more favourable to employees, national implementation provisions apply to seagoing vessels in a significant part of the European Member States.[1182] These include some of the world's largest shipping nations, such as Germany, Italy and the United Kingdom. Thus, the question arises whether the inclusion of seagoing vessels in the revised Article 1(3) of the Acquired Rights Directive meets its aim of placing the laws of the Member States on equal footing and establishing a more of a level playing field for the seagoing professions. In this it is important to note

[1176] COM(75) 429.

[1177] Cf. COM(2007) 591 final, p. 7.

[1178] Glockauer 2003, p. 49; to this end, the Explanatory Memorandum to the Dutch implementation provisions of directive 77/187/EC (*Kamerstukken II* 1979/80, 15940, no. 3, p. 5 (MvT)) states that the rules applying to the crews of seagoing vessels in maritime law make it extremely difficult for the directive to apply to those vessels.

[1179] COM(94) 300 final.

[1180] See COM(94) 300 final, *OJ* 1994, C 274/08 et seq.

[1181] *Cf. Castle View Services Ltd* v. *Howes & Ors* [2000] ScotCS 49; *Numast & Anor* v. *P&O Scottish Ferries & Ors* [2005] EAT S/0060/04.

[1182] Austria, the Czech Republic, Estonia, France, Germany, Hungary, Italy, Ireland, Lithuania, Poland, Portugal, Spain, Sweden and the UK, *cf.* COM(94) 300 final, para. 31; *Cf.* Impact assessment, p. 51 (*infra* note 73); Commission Report on Council Directive 2001/23/EC of 12 March on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, SEC(2007) 812; COM(2007) 334 final.

that the implementation of the directive is not considered to justify 'any regression in relation to the situation which already prevails in each Member State'.[1183]

*2.1 Recent developments*

During the review of the social directives in light of the maritime sector, the Acquired Rights Directive, a staple of European social legislation, was considered among to most important:

> 'Of particular concern are the rights of seagoing workers to protection in the case of insolvency of their employer or transfer of undertakings, where a coherent approach should be promoted in order to enable them to exercise their rights effectively both at national level and in Community-scale undertakings.'[1184]

Due to the exclusion of seagoing vessels from the scope of the Acquired Rights Directive, the acquired rights of seafaring workers were generally not safeguarded upon the transfer of a seagoing vessel. Whereas land-based workers and crews of inland navigation vessels[1185] enjoyed the automatic transfer of the employment relationship from the transferor to the transferee as well as protection against dismissal and the right to information and consultation,[1186] seagoing workers frequently found themselves without employment as a result of the transfer of the undertaking in which they were engaged. In a preparatory study for an impact assessment concerning a possible revision of the exclusions of seafaring workers from the scope of EU social legislation it was concluded that the transfer of a vessel often counts as grounds for redundancy.[1187] The study shows that upon the sale or transfer of a vessel the existing crew is commonly paid the balance of their

[1183] Recital 13, Directive (EU) 2015/1794.
[1184] COM(2007) 591 final, p. 12.
[1185] See, e.g., Rb. Dordrecht 24 April 1996, *JAR* 1996/198, ECLI:NL:RBDOR:1996:AM1891.
[1186] These three aspects of a transfer of undertaking are considered the three pillars of the Acquired Rights Directive.
[1187] MRAG, 'European Commission. Preparatory study for an impact assessment concerning a possible revision of the current exclusions of seafaring workers from the scope of EU social legislation', Framework Service Contract, No. FISH/2006/09-LOT2, April 2010, p. 54, para. 313.

contracts.[1188] As such, vessels are usually acquired without crew.[1189] Bringing seagoing vessels within the ambit of the Acquired Rights Directive may change this practice since it would ensure the automatic transfer of the rights and obligations stemming from the employment contracts or employment relationships of the existing crew to the transferee. In 2011, the Task Force on Maritime Employment and Competiveness, established to, among others, develop recommendations on striking a just balance between the employment conditions of European seafarers and the competitiveness of the European fleet,[1190] concluded that the elimination of the exclusion of seagoing workers from European social directives would 'help eliminate the impression that seafarers are less well protected by European Union labour law than other employees'[1191], 'particularly when no clear justification'[1192] for the exclusions exists. As such, it proposed the elimination of the exclusion of seagoing workers from four European social directives, including Directive 2001/23/EC.[1193] In its 2013 proposal for a directive the European Commission extended this elimination to five social directives.[1194]

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[1188] [1188] MRAG, 'European Commission. Preparatory study for an impact assessment concerning a possible revision of the current exclusions of seafaring workers from the scope of EU social legislation', Framework Service Contract, No. FISH/2006/09-LOT2, April 2010, p. 54, para. 314.

[1189] MRAG, 'European Commission. Preparatory study for an impact assessment concerning a possible revision of the current exclusions of seafaring workers from the scope of EU social legislation', Framework Service Contract, No. FISH/2006/09-LOT2, April 2010, p. 54, para. 314.

[1190] Report of the Task Force on Maritime Employment and Competitiveness and Policy Recommendations to the European Commission, p. 1, available online at: <http://ec.europa.eu/transport/modes/maritime/seafarers/doc/2011-06-09-tfmec.pdf>.

[1191] Report of the Task Force on Maritime Employment and Competitiveness and Policy Recommendations to the European Commission, p. 14, available online at: <http://ec.europa.eu/transport/modes/maritime/seafarers/doc/2011-06-09-tfmec.pdf>.

[1192] Report of the Task Force on Maritime Employment and Competitiveness and Policy Recommendations to the European Commission, p. 14.

[1193] In addition the task force proposed the removal of exclusion provisions from Council Directive 2008/94 EC on the approximation of laws of the Member States relating to the protection of employees in the event of insolvency of their employer; Council Directive 2009/38/EC on European Works Councils and Directive 2002/14/EC establishing a general framework for informing and consulting employees in the European Community.

[1194] Proposal for a directive of the European Parliament and of the Council on seafarers amending Directives 2008/94/EC, 2009/38/EC, 2002/14/EC, 98/59/EC and 2001/23/EC, COM (2013) 798 final.

Where it concerns the Acquired Rights Directive the proposal extended the scope of the directive to include seagoing vessels registered in or flying the flag of a Member State, [1195] whereas the final, adopted, directive brings transfers of seagoing vessels that are part of a transfer of undertaking within the ambit of the directive, provided that the transferee is situated, or the transferred undertaking remains situated, within a Member State.[1196] The following paragraphs will show the path towards the removal of the exclusion for seagoing vessels and discuss the merits of the newly inserted Article 1(3) of the Acquired Rights Directive.

*2.1.1 Eliminating the exclusion*

In eliminating the exclusion of seagoing vessels from the Acquired Rights Directive, the preparatory study for an impact assessment identifies three options: (1) amending existing legislation requiring a guarantee of the same level of protection for seafaring workers by means of national legislation, (2) suppressing the exclusion and extending the general scope of the directive to seagoing vessels, and (3) providing specific legislation or specific provisions covering seagoing vessels or seagoing workers within the existing directive.[1197] The first two options maintain the existing territorial scope of the directive. As extensively discussed in previous Chapters the Acquired Rights Directive, by reason of Article 1(2), applies whenever the business to be transferred is located within EU territory prior to its transfer. According to Article 1(2) the directive 'shall apply where and in so far as the undertaking, business or part of the undertaking or business to be transferred is situated within the territorial scope of the Treaty'.[1198] Thus, the application

[1195] Article 5 Proposal for a directive of the European Parliament and of the Council on seafarers amending Directives 2008/94/EC, 2009/38/EC, 2002/14/EC, 98/59/EC and 2001/23/EC, COM (2013) 798 final.

[1196] Article 5 Directive (EU) 2015/1794.

[1197] MRAG, 'European Commission. Preparatory study for an impact assessment concerning a possible revision of the current exclusions of seafaring workers from the scope of EU social legislation', Framework Service Contract, No. FISH/2006/09-LOT2, April 2010, p. 83-84; the other option presented in the report, which is: no action, is not covered in this paragraph as this option would not result in the elimination of the current exclusion.

[1198] The term Treaty refers to the consolidated version of the Treaty on the Functioning of the European Union, *OJ* 2010, C 83/47. At the time of its adoption the term Treaty in Art. 1(2) Directive 2001/23/EC referred to the Treaty establishing the European Community (consolidated version), *OJ* 2006 C, 321E.

of the directive is entirely contingent on the geographical situation of the undertaking to be transferred. This geographical contingency additionally exists in the conflict of laws solution provided for transfers of undertakings in the previous Chapter. On the basis of this solution national implementation provisions are to apply whenever the undertaking to be transferred is situated within a Member State upon or immediately prior to the transfer. Upon the inclusion of seagoing vessels in the Acquired Rights Directive, if opted for policy options 1 or 2 and maintaining the present geographical scope of the directive, it is important to establish which maritime areas belong to the territory of a Member State.[1199] In recent history, seagoing vessels were considered floating territories of the state that determined their nationality.[1200] In other words, vessels were assimilated to the territory of the flag state. Nowadays, however, they are merely thought to enjoy the nationality of the flag state, causing them to be subject to that state's jurisdiction and control in administrative, technical and social matters.[1201] Since seagoing vessels are no longer considered part of the territory of the flag state, the application of the directive will become entirely dependent on the geographical location of the vessel to be transferred immediately prior to its transfer.[1202] After all, the territorial application of the Acquired Rights Directive is contingent upon the location of the undertaking to be transferred. Under policy option 1 and 2 no change to the territorial scope of the Acquired Rights Directive is proposed. This may prove problematic where it concerns the transfer of seagoing vessels if they by

[1199] This includes both the Member States of the EU and the Member States of the European Economic Area.

[1200] *Cf.* Ludewig 2012, p. 92-93; Franzen 1994, p. 91-92; Junker 2006, p. 407; Jensen 2006.

[1201] Art. 94 UNCLOS, this jurisdiction extends to the vessel's master, officers and crew (Art. 94(2)(b) UNCLOS); Art. 5 of the Convention on the High Seas 1958, *UNTS*, vol. 450, p. 11, p. 82, available online at:
<http://untreaty.un.org/ilc/texts/instruments/english/conventions/8_1_1958_high_seas.pdf>.
In light of the position of the ECJ under the Habitats Directive, an environmental protection directive with a scope similar to that of the Acquired Rights Directive, it can be argued that the ARD requires direct application to seagoing vessels by virtue of the sovereign powers that the flag state is allowed to exercise in social matters, despite the fact that these vessels are no longer considered part of a Member State's territory. A comprehensive explanation of this argument is beyond the scope of this article.

[1202] I.e. if the repeal of the provision excluding seagoing vessels from the Acquired Rights Directive is not coupled with a change in the current scope rule.

themselves are considered an undertaking within the meaning of the directive. In these cases, for a transfer of a seagoing vessel to take effect, the vessel must be located within the territory of a European Member State as otherwise the Acquired Rights Directive will not be applicable. To this end, the question will arise as to what parts of the sea belong to a Member State's territory. As the territory of the Member States is limited to areas where they can assert full sovereignty, their maritime territory includes their internal waters, territorial waters, international straits and archipelagic waters.[1203] Hence, it appears that the application of the Acquired Rights Directive will be restricted to these waterways, which may also warrant the conclusion that the Acquired Rights Directive cannot be applied beyond the territorial seas to the areas of the ocean in or over which a state can uphold limited sovereign rights or exercises jurisdiction, e.g., the Continental Shelf and the Exclusive Economic Zone.[1204] This conclusion is supported by a judgment in a case involving a change in the provider of manning services of North Sea oil vessels before the English Employment Appeal Tribunal. Here, the tribunal questioned whether the application of the Acquired Rights Directive extended to undertakings situated within the UK area of the Continental Shelf prior to their transfer.[1205] The maritime crew of several North Sea flotels[1206] were considered to have been unfairly dismissed upon the takeover of their former employer's business. In deciding on this matter, the EAT rejected the idea that EU law applies to all economic activities undertaken in an area under the jurisdiction of a Member State and concluded that the

[1203] Tanaka 2012, p. 6.

[1204] In the EEZ and on the Continental Shelf the Member States merely possess sovereign rights for the purpose of exploring and exploiting natural resources (Art. 56(1)(a) in conjunction with Art. 77 UNCLOS). In addition, where it concerns the EEZ, the sovereign rights of the Member States extend to 'activities for the economic exploitation and exploration of the zone, such as the production of energy from water, currents and wind' (Art. 56(1)(a) UNCLOS). Likewise, the Member States have jurisdiction with regard to the establishment and use of artificial islands, installations and structures (Art. 56(1)(b)(i) UNCLOS), marine research and the protection (Art. 56(1)(b)(ii) UNCLOS) and preservation of the marine environment (Art. 56(1)(b)(iii) UNCLOS).

[1205] *Addison and others* v. *Denholm Ship Management (UK) Ltd & Ors* [1997] ICR 770; this included the question whether the UK Continental Shelf formed part of UK territory and/or the territorial scope of the Treaty.

[1206] These flotels provided accommodation for the large number of workers required during the construction and hook-up of fixed offshore oil and gas installations.

Continental Shelf is not within the territorial scope of the Treaty and that the directive can therefore not be extended to cover activities therein. In a comparable case before the EFTA court,[1207] involving the transfer of maintenance tasks on a fixed offshore gas production installation situated in the Norwegian and British part of the Continental Shelf,[1208] the applicability of the Acquired Rights Directive to undertakings situated outside territorial waters was not called into question. Here, the court held that the directive may 'be applicable in the situation of a transfer of maintenance tasks on a fixed offshore installation for gas production'.[1209] Although a strict interpretation of Article 1(2) of the directive would advocate against the application of the Acquired Rights Directive outside the territories of the Member States, 'the preparatory study for an impact assessment concerning a possible revision of the present exclusions of seafaring workers from the scope of EU social legislation'[1210] does consider the Acquired Rights Directive to apply to undertakings situated within the EEZs of the Member States.

In light of the territorial scope of the directive, the freedom of navigation combined with the mobility of seagoing vessels forms an important concern with regard to the applicability of the Acquired Rights Directive. Since the directive applies whenever the undertaking or part of the undertaking to be transferred is situated within the territory of the EU, the high mobility of seagoing vessels might prevent application of the directive[1211] whenever the vessel is located outside European waters[1212] upon or immediately prior to its transfer. Where the applicability of the Acquired Rights Directive is

[1207] Case E-2/04 *Reidar Rasmussen, Jan Rossavik, and Johan Käldman* v. *Total E&P Norge AS, v/styrets formann* [2004] EFTA CR 54.

[1208] This case differs from *Addison* v. *Denholm Ship Management* in the sense that here it concerned a fixed installation.

[1209] Case E-2/04 *Reidar Rasmussen, Jan Rossavik, and Johan Käldman* v. *Total E&P Norge AS, v/styrets formann* [2004] EFTA CR 54, para. 43. The judgment in this case can be constructed as arguing in favour of applying the Acquired Rights Directive to undertakings situated on the area of the Continental Shelf belonging to the Member States.

[1210] European Commission, 'Preparatory Study for an Impact Assessment Concerning a Possible Revision of the Current Exclusions of Seafaring Workers from the Scope of EU Social Legislation', Framework Service Contract No. FISH/2006/09 – LOT2 [2010].

[1211] I.e. the various national provisions transposing the directive.

[1212] I.e. the combined internal waters and territorial waters of the Member States.

contingent upon physical presence within EU territory a vessel can easily avoid application by venturing outside European waters. By the same token, vessels that are merely passing through European waters may unintentionally be captured by the provisions of the directive. Since the purpose of the reform of the Acquired Rights Directive is to better protect those working in the European seafaring industry, the aforementioned occurrences are undesirable. In order to prevent intentional circumvention of the provisions of the directive and to enhance legal certainty, policy option 3, i.e. providing specific legislation or specific provisions covering seagoing vessels or seagoing workers within the existing directive, appears to hold the desired course of action. On a previous occasion, I have advocated a revision of the scope of the directive to the extent that the Acquired Rights Directive is to apply to European seagoing vessels irrespective of their location at the time of the transfer, e.g., by the assertion that the directive is to apply to (the crews of) seagoing vessels whenever the vessel to be transferred is controlled and operated from a Member State.[1213] Given the risk of flagging out this approach is to be preferred over the application of the directive whenever the vessel to be transferred is registered in a Member State. The latter approach however, was the exact course taken by the European Commission in its original proposal for a directive.

*2.1.2 Proposal for a Directive*

The proposal for a Directive of the European Parliament and of the Council on seafarers amending Directives 2008/94/EC, 2009/38/EC, 2002/14/EC, 98/59/EC and 2001/23/EC[1214] of 2013 aims 'to improve the level of protection of the rights protected under the EU Charter of Fundamental Rights in EU labour law and to ensure a level playing field at EU level' where it concerns seagoing workers.[1215] In order to achieve this aim the proposal advocates the repeal of Article 1(3) of the Acquired Rights Directive and replacement by a provision that fully secures the application of

[1213] Henckel 2012.

[1214] Proposal for a Directive of the European Parliament and of the Council on seafarers amending Directives 2008/94/EC, 2009/38/EC, 2002/14/EC, 98/59/EC and 2001/23/EC, COM (2013) 798 final.

[1215] Proposal for a Directive of the European Parliament and of the Council on seafarers amending Directives 2008/94/EC, 2009/38/EC, 2002/14/EC, 98/59/EC and 2001/23/EC, COM (2013) 798 final, p. 3.

the directive to seagoing vessels that are registered in and/or flying the flag of a Member State. As such, the proposal, in Article 5, suggests the following changes to Directive 2001/23/EC:

> 'Directive 2001/23/EC is amended as follows:
> Article 1 is amended as follows:
>
> (1) Paragraph 2 is replaced by the following:
> '2. This Directive shall apply, without prejudice to paragraph 3, where and insofar as the undertaking, business or part of the undertaking or business to be transferred situated within the territorial scope of the Treaty.'
>
> (2) Paragraph 3 is replaced by the following:
> '3. This Directive shall apply to the transfer of a seagoing vessel registered in and/or flying the flag of a Member State and constituting an undertaking, business or part of an undertaking or business for the purposes of this Directive, even when it is not situated within the territorial scope of the Treaty.'
>
> (3) The following paragraph 4 is added:
> '4. Member States may, after consulting the social partners, provide that Chapter II of this Directive does not apply in the following circumstances:
> (a) the object of the transfer consists exclusively of one or more seagoing vessels,
> (b) the undertaking or business to be transferred operates only one seagoing vessel.'[1216]

If the proposal for a directive would have been adopted the Acquired Rights Directive would have, by reason of the new Article 1(3) applied to the transfer of a seagoing vessel registered in and/ or flying the flag of a Member State, regardless of its geographical location at the time of the transfer. As such, the proposal deservedly proposes a different territorial

[1216] Proposal for a Directive of the European Parliament and of the Council on seafarers amending Directives 2008/94/EC, 2009/38/EC, 2002/14/EC, 98/59/EC and 2001/23/EC, COM (2013) 798 final, p. 16-17.

scope for the transfer of seagoing vessels than it does for land-based undertakings. Where it concerns land-based undertakings the directive, on the basis of Article 1(2), applies whenever the undertaking to be transferred is situated within EU territory. For seagoing vessels however, the flag or state of registration is decisive. Seeking connection to the flag state or the state of registration bears the risk that ship owners will subject the vessel to a purposeful reflagging in order to prevent the occurrence of a transfer of undertaking and application of the Acquired Rights Directive. This ease of flagging out is a means of substituting the existing workforce for low wage workers subject to the laws and regulations of countries with lower or difficultly enforced labour standards, a means of lowering labour standards and effectuating cost reduction which is considered unparalleled on shore.[1217] It is this risk of flagging out that constituted the main reservation of the European Economic and Social Committee to the proposed changes to the Acquired Rights Directive.[1218] In its opinion on the proposal the European Economic and Social Committee pointed to the special features of the transfer of seagoing vessels, especially pertaining to a change of flag upon or after the transfer.[1219] According to the Committee, a change in flag may result in a considerable deterioration of the economic position and employment conditions of the affected employees. In light of this the Committee urged the Commission to ensure that transfers of undertakings involving a simultaneous or subsequent change in flag would fall within the remit of the Acquired Rights Directive as otherwise the rights of seagoing workers might be eroded.[1220] Applying the provisions of the Acquired Rights

[1217] Marsh & Ryan 1989; Kahveci & Nichols 2006, p. 16; Dimitrova 2010, p. 17.

[1218] Opinion of the European Economic and Social Committee on the 'Proposal for a Directive of the
European Parliament and of the Council on seafarers amending Directives 2008/94/EC, 2009/38/EC, 2002/14/EC, 98/59/EC and 2001/23/EC, *OJ* [2014] C226/39.

[1219] Opinion of the European Economic and Social Committee on the 'Proposal for a Directive of the
European Parliament and of the Council on seafarers amending Directives 2008/94/EC, 2009/38/EC,
2002/14/EC, 98/59/EC and 2001/23/EC, *OJ* [2014] C226/39, para. 5.15.

[1220] Opinion of the European Economic and Social Committee on the 'Proposal for a Directive of the
European Parliament and of the Council on seafarers amending Directives 2008/94/EC, 2009/38/EC, 2002/14/EC, 98/59/EC and 2001/23/EC, *OJ* [2014] C226/39, para. 5.15. It is

Directive and its national counterparts to the transfer of a seagoing vessel registered in and/or flying the flag of a Member State even when it is not situated within the territorial scope of the Treaty, allows for the purposeful circumvention of acquired rights provisions by means of a simultaneous of subsequent reflagging of the vessel. As such, the proposed revision of the Acquired Rights Directive does not fully meet its aim of equating the transfer of seagoing vessels to the transfer of land-based undertakings and securing a level playing field for maritime employees. During the discussion of the proposal many Member State delegations therefore expressed concern over the proposed Article 5 of the directive concerning the revision of the Acquired Rights Directive. In their view this Article should be 'substantially improved to take due account of the particular features of the shipping sector such as its worldwide dimension and the risk of flagging out.'[1221] In light of these considerations a revised draft proposal was issued. This draft proposal corresponds to the adopted *Directive (EU) 2015/1794* and severely minimizes the revision to the Acquired Rights Directive.

*2.2 Directive (EU) 2015/1794*

Aiming to improve the working conditions of seafarers and their information and consultation, Directive (EU) 2015/1794 of the European Parliament and of the Council of 6 October 2015 amending Directives 2008/94/EC, 2009/38/EC and 2002/14/EC of the European Parliament and of the Council, and Council Directives 98/59/EC and 2001/23/EC,[1222] as regards seafarers was adopted in 2015. The adopted directive, in Article 5, alters the scope of the Acquired Rights Directive by ensuring its application to seagoing vessels:

> '3. This Directive shall apply to a transfer of a seagoing vessel that is part of a transfer of an undertaking, business or part of an undertaking

unclear in which transfer-related cases a reflagging may be justified or how much time should pass between the reflagging and the subsequent transfer for the reflagging not to be considered a purposeful evasion of acquired rights provisions.

[1221] Report from the Presidency to the Council 4 December 2014, 16148/1/14, 2013/0390 (COD) available online at: <register.consilium.europa.eu>

[1222] Directive (EU) 2015/1794 of the European Parliament and of the Council of 6 October 2015 amending Directives 2008/94/EC, 2009/38/EC and 2002/14/EC of the European Parliament and of the Council, and Council Directives 98/59/EC and 2001/23/EC, as regards seafarers, *OJ* [2015] L 263/1.

> or business within the meaning of paragraphs 1 and 2, provided that the transferee is situated, or the transferred undertaking, business, or part of an undertaking or business remains, within the territorial scope of the Treaty.
>
> This Directive shall not apply where the object of the transfer consists exclusively of one or more seagoing vessels.'

Compared to the earlier proposal the directive severely limits the application of the Acquired Rights Directive to seagoing vessels. Whereas the proposal suggested a different territorial scope for seagoing vessels, directive (EU) 2015/1794 holds firm to the existing territorial scope of Article 1(2). In this sense, the provisions of the Acquired Rights Directive and its national counterparts apply whenever the undertaking to be transferred is situated within a Member State and includes the transfer of a seagoing vessel. The directive further reduces the territorial scope of the directive for seagoing vessels by requiring the transferee to be situated or the undertaking to remain situated within the territory of a Member State. By doing so, there exists a different scope of application for transfers of undertakings that include seagoing vessels than there exists for the transfer of wholly land-based undertakings. Where the transfer of land-based undertaking may include domestic, intra-European and outbound transfer scenarios, the transfer of an undertaking including a seagoing vessel is limited to domestic and intra-European transfer scenarios as the directive requires the transferred undertaking to be situated within a European Member State both before and after the transfer.[1223] I wonder whether the directive, which set out to ameliorate the position of seagoing personnel and create a level playing field for the maritime professions, has brought any significant change to the Acquired Rights Directive. The directive now applies to the 'transfer of a seagoing vessel that is part of a transfer of an undertaking, business or part of an undertaking or business'[1224], thus ensuring the automatic transfer of the rights and obligations stemming from the employment relationship of the crew of a seagoing vessel upon a change in the person responsible for

[1223] The only deviation from this territorial scope may exist where the undertaking to be transferred is situated in a Member State along with the transferee, but the undertaking is transferred to a non-Member State upon or immediately after the transfer of undertaking.
[1224] Article 5 Directive (EU) 2015/1794.

carrying on the business.[1225] However, even though the directive, in its previous wording, excluded seagoing vessels from its scope, it was assumed that the exclusion did not pertain to the transfer of an undertaking that involved a seagoing vessel, allowing its application to the transfer of e.g. shipping companies and situations where the seagoing vessel merely constituted a tangible asset.[1226] Directive (EU) 2015/1794 reiterates that the Acquired Rights Directive does not apply to single vessel transfers where the object of the transfer consists exclusively of one (or more) seagoing vessels. Here, the directive differs from the prior proposal, which in principle applied to such types of transfers, but allowed the Member States the option to exclude the application of their national acquired rights provisions if the object of the transfer consisted exclusively of one or more seagoing vessels or if the undertaking or business to be transferred only operated one vessel.[1227] The Committee of Regions opposed the latter option as it believed that undertaking should be treated equally irrespective of whether they operate one or more vessels.[1228] The newly adopted directive in some respect relieves some of the uncertainty provided by the proposal in the sense that it no longer provides the Member States with the option of excluding certain vessel transfers, rather it includes an exclusion itself. This exclusion, entailing that the Acquired Rights Directive does not apply to single vessel transfers where the object of the transfer consists exclusively of one (or more) seagoing vessel(s) appears superfluous. After all, in establishing whether a transfer of undertaking has occurred the deciding factor is whether that undertaking has retained its identity, requiring a consideration of whether the vessel was transferred as a going concern, indicated by the resumption or continuation of its operation(s) by the new employer.[1229] In this sense it is undeniable that the transfer of a single (or more) seagoing vessel(s) as a mere tangible asset does not in itself constitute a transfer of

[1225] *Cf.* Article 3(1) Acquired Rights Directive.
[1226] *Kamerstukken II* 1979/80, 15940, no. 3, p. 5 (MvT); *Kamerstukken II* 1979/80, 15940, no. 7, p. 3 (MvA); *Kamerstukken II* 1979/80, 15940, no. 5, p. 3; Christe 2010 (*Arbeidsrecht*), Art. 7:666 BW, note 3; Rb. Dordrecht 24 April 1996, *JAR* 1996/198, ECLI:NL:RBDOR:1996:AM1891; Drobnig & Puttfarken 1989, p. 74, 77.
[1227] Article 5(3) COM (2013) 798 final.
[1228] Opinion of the Committee of the Regions — Amendment of the directives on exclusions for seafarers *OJ* [2014] C 174/53-54.
[1229] Case 24/85 *Spijkers v Benedik* [1986] *ECR* 1119, ECLI:EU:C:1986:127.

undertaking, an echo of this notion within the wording of the directive is needless. In other words, the the wording that the directive 'shall not apply where the object of the transfer consists exclusively of one or more seagoing vessels' may have been included to avert the notion that the transfer of a single vessel (or multiple vessels) by itself constitutes the transfer of an undertaking. For an undertaking to be transferred under the directive that undertaking needs to retain its identity. As such, the mere transfer of a vessel will in most cases not be sufficient to effectuate the application of the directive. As such, in addition to the vessel the transferee will have to continue the business in a similar fashion as operated by the transferor, such continuation may require the additional transfer of e.g. certain transport and charter contracts, shipping routes and client base. As outlined above, although the inclusion of the wording is understandable, it is meaningless in the sense that the retention of identity-test applies to seagoing vessels and land-based undertakings alike. The exact reasons underlying the original exclusion from the directive remain unclear, it appears to me that the exclusion to some extent must have been preempted by the notion that a single vessel may be operated as an undertaking.[1230] A repeal of the exclusion should therefore hold true to this notion.[1231] In this sense, the new Article 1(3) Acquired Rights Directive should be interpreted as applying to single vessel transfers that constitute the transfer of an undertaking.

**3. Cross-border transfer of seagoing vessels**

As extensively discussed in the previous Chapters, the Acquired Rights Directive and its national counterparts apply whenever the 'transfer of an undertaking, business, or part of an undertaking or business to another employer as a result of a legal transfer or merger' occurs.[1232] Consequently, a transfer of undertaking constitutes 'a change in the natural or legal person responsible for carrying out the business, who by virtue of this change acquires the obligations of an employer vis-à-vis employees of the undertaking, regardless of whether or not ownership has been

[1230] Similar: Athanassopoulou 2005, p. 15.

[1231] The new Article 1(3) should not be interpreted as merely applying where the seagoing vessel merely constitutes a single asset in the transfer of a larger undertaking.

[1232] Art. 1(a) Directive 2001/23/EC.

transferred.'[1233] In order for the provisions of the directive to apply there needs to be a transfer of an 'economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary'[1234], this equally applies to the transfer of seagoing vessels that are part of the transfer of an undertaking. The aim of the present paragraph is to assess whether a transfer of a seagoing vessel, most notably a single seagoing vessel can result in the transfer of a going concern that retains its identity. In aiding this assessment, the ECJ has set forth an ever-growing set of guidelines regarding the interpretation of the concept of *undertaking*. Decisive is whether the business was disposed of as a going concern, indicated by the resumption or continuation of its operation(s) (with the same or similar activities) by the new employer. In determining whether the transferred undertaking has retained its identity the court has to weigh the factors outlined in the flagship judgment of *Spijkers*.[1235] The court has to take into account all the circumstances that characterise the undertaking in question such as the type of undertaking or business, the transfer of tangible assets, the value of intangible assets, the transfer of the majority of the employees, the transfer of customers as well as the degree of similarity between the activities carried on before and after the transfer and the period, if any, for which the activities were suspended.[1236] All of these circumstances are single factors in an overall assessment and cannot be considered in isolation.[1237] It is for the national court to take these factors into account in its overall assessment of whether a transfer of undertaking has taken place and whether the transfer of a (single) seagoing vessel may constitute a transfer of undertaking.

*3.1 Concept of undertaking and seagoing vessels*

As mentioned above, the former express exclusion of (single) seagoing vessels from the Acquired Rights Directive suggests that the transfer of these vessels could entail a transfer of undertaking had it not been for this

[1233] Case C-234/98 *Allen v Amalgamated Construction* [1999] ECR I-8643, ECLI:EU:C:1999:594.

[1234] Art. 1(b) Acquired Rights Directive (Directive 2001/23/EC).

[1235] Case 24/85 *Spijkers v Benedik* [1986] *ECR* 1119, ECLI:EU:C:1986:127.

[1236] For a more extensive discussion of these factors see Chapter 2.

[1237] Case 24/85 *Spijkers v Benedik* [1986] *ECR* 1119, ECLI:EU:C:1986:127, para. 13.

exclusion.[1238] Even though the exclusion has now been repealed, the mere sale or charter of a vessel does not readily constitute a transfer of undertaking under the Acquired Rights Directive and its national counterparts as is clear from the wording of the newly inserted Article 1(3), which states that the directive is not to apply to the mere transfer of a seagoing vessel.In order for the provisions of the directive to apply, the vessel needs to be 'part of a transfer of an undertaking, business or part of an undertaking or business' and thus constitute an 'economic entity which retains its identity'.[1239] Originally, the application of the Dutch acquired rights provisions did not extend to the transfer of single seagoing vessels.[1240] The provisions, however, did cover the transfer of inland navigation vessels[1241] and shipping companies in their entirety.[1242] Inspiration for the practical application of the acquired rights provisions to seagoing vessels may therefore be drawn from the application of the Dutch acquired rights provisions to inland navigation vessels. In a decision by the district court of Dordrecht the sale of an inland navigation vessel was considered a transfer of undertaking.[1243] The court held that the vessel was disposed of as a going concern and that its operation was resumed by the transferee with the same or similar activities. In fact, after the transfer, the transferee carried the same cargo over the same routes for the same single charterer. The takeover of the charter contract and the continuation of the vessel's prior route were of material importance in the conclusion that a transfer of undertaking had occurred.[1244] Surely, seagoing vessels differ from inland navigation vessels not only in size, but also in that they often carry cargo for different charterers, do not have a fixed home port or operate on different international routes. In light of the importance attributed to the transfer of the charter agreement and the continuation of the existing shipping route in the abovementioned case, combined with the fact that Article 1(3) only allows

[1238] Athanassopoulou 2005, p. 15.
[1239] Art. 1(b) Acquired Rights Directive.
[1240] Art. 7:666(2) expressly states that the acquired rights provisions do not apply to the crews of seagoing vessels.
[1241] Beltzer (*T&C Arbeidsrecht*), Art. 7:666 BW, note 3.
[1242] *Kamerstukken II* 1979/80, 15940, no. 3, p. 5 (MvT); *Kamerstukken II* 1979/80, 15940, no. 7, p. 3 (MvA); *Kamerstukken II* 1979/80, 15940, no. 5, p. 3; Christe 2010 (*Arbeidsrecht*), Art. 7:666 BW, note 3.
[1243] Rb. Dordrecht 24 April 1996, JAR 1996/198, ECLI:NL:RBDOR:1996:AM1891.
[1244] Rb. Dordrecht 24 April 1996, JAR 1996/198, ECLI:NL:RBDOR:1996:AM1891, para. 9.

for the application to seagoing vessels where that vessel is part of a transfer of undertaking it seems unlikely that Dutch law would consider a seagoing vessel *per se* to constitute an undertaking under its acquired rights provisions. Here, Germany, the world's third largest ship-owning nation,[1245] can serve as an example as it has already extended the application of its main national acquired rights provision, § 613a BGB, to single seagoing vessels. In German case law it is well established that a seagoing vessel does not constitute a single asset, but concerns a whole variety of items that, with the help of the division of labour amongst a group of workers, is utilised to realise a permanently invested independent employment-technical purpose.[1246] In this view, a seagoing vessel equals neither a machine that is used for production nor a truck utilised for freight transport. In this view, due to its unique nature, a seagoing vessel can only be compared to a factory.[1247] The work aboard a seagoing vessel is carried out by a variety of departments[1248] including, but not limited to, the deck department,[1249] marine engineering department,[1250] the stewards' department,[1251] and the medical department. In addition, the vessel is comprised of individual substantive assets amounting to one whole, such as marine electronics, navigation, communication and fish-finding equipment, sonar and the engine(s). As such, a seagoing vessel cannot merely be characterised as a floating marine structure, since it forms a complicated and highly organised assembly of individual assets creating an organisational autonomy which forms the basis for the employees' performance.[1252] In conjunction with this assembly of

[1245] Together with Greece, Japan and China, Germany controls half of the world fleet.

[1246] BAG 18 March 1997 – 3 AZR 729/95; BAG 2 March 2006 – 8 AZR 147/05; LAG Hamburg 7 March 1995 – 6 Sa 53/94; LAG Hamburg 7 April 2005 – 7 Sa 65/04; LAG Hamburg 3 March 2005 – 1 Sa 35/04; ArbG Hamburg 27 April 2004 – 1 Ca 71/04.

[1247] Athanassopoulou 2005, p. 21.

[1248] Reid, Nichols & Williams 2009, under <certifications>.

[1249] This department is in charge of the vessel's navigation and operation.

[1250] The engineering department is centred on ship propulsion and the maintenance of machinery.

[1251] This includes catering and cleaning services, Cf. ILO Food and Catering (Ships' Crews) Convention (C68), 1946, available online at: <www.ilo.org>.

[1252] *Cf.* Case C-466/07 *Dietmar Klarenberg v Ferroton Technologies GmbH* [2009] *ECR* I-803, ECLI:EU:C:2009:85 in which the ECJ held that the retention of organisational autonomy is no longer wholly required for the application of the Acquired Rights Directive. The preservation of a functional link between the various elements of the transferred undertaking

assets, the workforce is paramount in realising the vessel's distinct nautical purpose, i.e. traversing the high seas and coping with the concomitant risks.[1253] Since, in this view, a seagoing vessel *per se* bears organisational autonomy, a mere transfer of the vessel combined with its usage by the transferee – which can be characterised as the continuation of the vessel's principal activity – may result in a transfer of undertaking. Whereas the German courts frequently base their decisions on the distinct nautical purpose of a seagoing vessel, some legal authors argue that the principal purpose of the vessel, being the transport of cargo or persons, should not be lost in the decision-making process.[1254] In this context, the question is raised as to which of the *Spijkers* factors should be taken into account where it concerns the transfer of a seagoing vessel.[1255] It is argued that a vessel, e.g., a cargo vessel, does not constitute an undertaking under the German acquired rights provision(s) if none of the charter and cargo carriage contracts have been transferred.[1256] The transfer of these charter contracts is considered equally important as the type of business being transferred and the transfer of the majority of the employees.[1257] It surely depends on the circumstances of the individual case as well as the type of vessel being transferred whether a transfer of undertaking has occurred. In this sense, the sale of a seagoing vessel on international routes without a home port will vastly differ from the contracting out of catering services aboard a ferryboat ferrying passengers between fixed harbours. In establishing whether an undertaking has been transferred, seagoing vessels are placed on equal footing with land-based undertakings, meaning that the *Spijkers* factors will have to be utilised to determine whether an *undertaking* has been transferred. To me it seems an unlikely scenario that all vessels amount to undertakings under the directive. Although seagoing vessels may be more akin to a factory than to a lorry, it must be remembered that where it concerns land-based undertakings

enabling the transferee to pursue an identical or analogous economic activity will likewise suffice.

[1253] Athanassopoulou 2005, p. 21.

[1254] Steffan 2000, p. 689; Kania 1994, p. 874; *Cf.* Glockauer 2003, p. 76 ; Athanassopoulou 2005, p. 26-27.

[1255] Steffan 2000, p. 689.

[1256] Kania 1994, p. 874.

[1257] Athanassopoulou 2005, p. 26-27; Steffan 2000, p. 687, 689; Kania 1994, p. 874; *Cf.* Glockauer 2003, p. 76.

factories do not *per se* constitute undertakings within the meaning of the directive either.[1258] After all, a transfer of undertaking requires a certain degree of similarity between the activities carried out before and after the transfer.[1259] In some cases, depending on the activities carried on by the factory, the transfer of mere tangible assets may therefore not be sufficient. Additionally, the transfer of e.g. intellectual property and client base may be required. Until the ECJ has ruled that all vessels amount to undertakings under the directive, which to me seems highly improbable, it is up to the court adjudicating the case to determine, on the basis of the applicable national implementation provisions, bearing in mind the guidelines set forth by the European Court and considering all the facts characterising the transaction in question, whether a transfer of undertaking has taken place. The continuation of the employment relationships with the new employer is therefore wholly dependent on the applicable national implementation provisions and the interpretation of the facts of the case in light of European case law.

### *3.2 Bareboat charter*

Within the international shipping industry transfers of undertakings may take many different guises. As the Acquired Rights Directive applies where there is a change in the legal or natural person responsible for carrying on the business regardless of whether or not ownership has been transferred,[1260] a transfer under the directive may include the transfer of a single vessel if that vessel is considered part of an undertaking. As such, it is worth examining whether the sale and charter of a vessel as well and the outsourcing of ship management may constitute such a transfer of undertaking.[1261] In this context, it is appropriate to cast a glance at a specific maritime transaction under which the transfer of the workforce is not anticipated, i.e. the bareboat

[1258] *Cf.* Chapter 2, paragraph 4.

[1259] Case C-24/85 *Spijkers v Benedik* [1986] *ECR* 1119, ECLI:EU:C:1986:127.

[1260] *Cf.* Case 287/86 *Ny Mølle Kro* [1987] *ECR* 5465, ECLI:EU:C:1987:573, para. 12; Joined Cases C-232/04 and C-233/04 *Securicor* [2005] *ECR* I-11237, ECLI:EU:C:2005:778, para. 31. In addition, a contractual relation between transferor and transferee is not required (Case C-51/00 *Temco Service Industries* [2002] *ECR* I-969, ECLI:EU:C:2002:48).

[1261] In German case law ship management agreements under which the owner outsources the management of the ship to a specific ship management company, have been considered transfers of undertakings where there has been a change in employer, i.e., where the ship management company forms the new employer.

charter. A bareboat charter[1262] constitutes the transfer of a vessel in its purest form. A bareboat charter or charter by demise is a contract for the usage of a 'bare' vessel for a stipulated period of time. The ship is transferred from the shipowner to the charterer without captain or crew. As owner *pro hac vice* the charterer assumes final responsibility over the operation of the vessel for the duration of the charter.[1263] In effect, the charterer has full control over the management of the vessel as well as which crew to appoint, whilst the ship owner is solely entitled to payment of the charter hire and to the return of the vessel upon completion of the charter.[1264] Because a bareboat charter essentially amounts to the transfer of a single seagoing vessel without a workforce it is of vital importance to establish whether such a charter constitutes the transfer of an undertaking under the Acquired Rights Directive and its national counterparts. Indeed, if it is considered a transfer of undertaking the employment relationships of the entire workforce employed on the vessel prior to the charter will transfer to the charterer by operation of law. This, in turn, might impair the continuance of the bareboat charter within Europe now that the exclusion of seagoing vessels from the ambit of the Acquired Rights Directive has been repealed.[1265]

If a bareboat charter were to amount to a transfer of undertaking under the Acquired Rights Directive, captain and crew would automatically transfer to the charterer, regardless of the intentions of the parties. This transfer could undermine the very nature and purpose of the bareboat charter, being the transfer of a bare vessel. Rather than a bareboat charter, the charter agreement will thus degenerate into a simple time charter. The question whether a bareboat charter constitutes a transfer of undertaking therefore

[1262] NL: *rompbevrachting*, D: *Bareboatvercharterung*, F: *affrètement coque nue.*

[1263] *Cf.* definitions of the concept of bareboat charter in Dutch legislation: Art. 1 chapeau and under b *Wet nationaliteit zeeschepen in rompbevrachting*), *Stb.* 1992, 541: '*In deze wet wordt verstaan onder: rompbevrachting: de overeenkomst, waarbij de ene partij, de rompvervrachter, zich verbindt een zeeschip zonder bemanning voor een bepaalde tijd ter beschikking te stellen van haar wederpartij, de rompbevrachter, zonder daarover nog enige zeggenschap te houden, en de rompbevrachter het schip exploiteert*', also see: Art. 8:530(1) BW, *Stb.* 1991, 126, Art. 8:990(1) BW, *Stb.* 1991, 126.

[1264] See Ademuni-Odeke 1998, p. 44; Athanassopoulou 2005, p. 106; Oostwouder 2001, p. 37.

[1265] This concern has not been identified in the impact assessment.

forms an important concern for the European shipping industry and its global competitiveness.

In German case law, the quintessential provision stemming from the Acquired Rights Directive, § 613a BGB, has been applied to bareboat charters on numerous occasions.[1266] Although not exclusively deciding against it, the *Bundesarbeitsgericht* has placed some reservations on the application of § 613a BGB in bareboat charter situations in the sense that the simple handover of a vessel does not fulfill the requirements of § 613a BGB.[1267] Here too, the essential criterion is whether the charterer has taken possession of a going concern enabling him to continue or pursue the same or similar activities. The mere transfer of the vessel into the care of the charterer makes that the he can utilise the vessel in its distinct purpose, being the transport of cargo and persons. However, the opinions differ when it comes to the effects to given to the possible continuation of this purpose. Whereas some believe that the continuance of the transport function is sufficient for the classification of a single vessel as transfer of undertaking,[1268] others posit that the acquired rights provisions will only apply to the charter if it concerns the transfer of an existing transport function, for instance in the case of cruise ships.[1269] Whether a bareboat charter *per se* forms a transfer of undertaking is therefore not easily decided. However, I would argue, especially given the inclusion in Article 1(3) that the transfer of seagoing vessels is only captured by the directive where they are part of an undertaking, that a the mere charter of a vessel does not (readily) amount to a transfer of undertaking. Although this inclusion is superfluous in the sense that any transfer under the directive is subject to the retention of identity test, it does appear to reiterate that a mere transfer of a vessel as a tangible asset does not constitute a transfer of undertaking. In this

[1266] LAG Hamburg 21 June 1989 – 8 Sa 24/89; LAG Hamburg 17 February 1995 – 6 Sa 41/94; ArbG Hamburg 29 January 1988 – S 1 Ca 199/86; LAG Hamburg 26 January 1989 – 7 Sa 28/88.

[1267] BAG 26 April 1990 – 2 AZR 170/89; in that sense, the charter of a bare vessel can be compared to the sale of a single tangible asset, which doesn't constitute a transfer of undertaking, *cf.* LAG Hamburg 26 January 1989 – 7 Sa 28/88.

[1268] Franzen 1994, p. 43-44.

[1269] Glockauer 2003, p. 75. These sorts of vessels will rarely be eligible for a bareboat charter as they are fully dependent on the skills and qualifications of the existing workforce.

sense the bareboat charter may be compared to the rental of a lorry or the lease of factory machinery. Although the charter allows the charterer to continue the vessel's distinct nautical purpose, a transfer of undertaking should not easily be assumed if e.g. the cargo contracts and client base are not continued. More so, from a maritime perspective, the inclusion of bareboat charter situations within the Acquired Rights Directive is not desired. It may signify the end of bareboat situations throughout Europe, as under the directive the employees transfer to the transferee by operation of law. Such an employee transfer abundantly conflicts with the purpose of the bareboat charter, which is to acquire the vessel without captain or crew. If due to the inclusion of seagoing vessels the practice of bareboat chartering (at least throughout Europe) will cease to exist this may cripple the competitiveness of the European seafaring industry. Again, it will be up to the court adjudicating the case to determine, on the basis of the applicable national implementation provisions and European guidelines, considering all the facts characterising the bareboat charter in question whether a transfer of undertaking has taken place. The continuation of the employment relationships upon a bareboat charter as well as the future of bareboat situations within Europe is therefore entirely dependent on whether a bareboat charter is captured by the Acquired Rights Directive. Even though it is unlikely and highly undesirable that a mere bareboat charter, encompassing nothing more than the transfer of a vessel, is covered by the Acquired Rights Directive, as such inclusion would be detrimental to the entire maritime sector, the directive does not prevent the Member States from offering extended employment protection.[1270] More so, directive (EU) 2015/1794, in Article 7, elucidates that the implementation of the directive shall under no circumstances constitute grounds for a reduction in the general level of protection of persons covered by this directive, already afforded by the Member States in the fields covered by, among others, the Acquired Rights Directive. As such, it appears that the Member States that already apply their national acquired rights provisions to seagoing vessels and different transfer scenarios associated with the maritime industry are encouraged to uphold these extensions of their national law.

[1270] Article 8 Directive 2001/23/EC.

## 4. Conflict of laws

Upon the transfer of an immobile or land-based undertaking to a foreign transferee, without relocation of the undertaking both the actual and legal position of the employees will often remain virtually unaffected.[1271] This is because, in most cases, neither the place of habitual employment nor the seat of the transferred undertaking is subject to change as a result of such a transfer.[1272] Consequently, the primary focus of the present research lies in transfers of undertakings that are coupled with a cross-border relocation of the undertaking to be transferred.[1273] It is in these situations, as outlined in previous Chapters, that issues of conflicting laws are bound to transpire. As such, upon a cross-border transfer of undertaking, it is for the conflict of laws to determine which legal system's acquired rights provisions are to be applied. Since the highly mobile nature of seagoing vessels might complicate the conflict of laws connection for transfers of undertakings, this Chapter seeks to assess whether the conflict of laws solution proposed in the previous Chapter requires adaptation now that seagoing vessels have become subject to the Acquired Rights Directive. After all, in addition to the inherently mobile nature of a vessel, the transfer of seagoing vessels is frequently coupled with a simultaneous reflagging of the vessel.[1274] To that effect, a Dutch vessel may for example be sold to a Danish shipping company which reflags the vessel under the Greek or Liberian flag. Such a change in ownership and flag may give rise to, e.g., a change in the applicable law to the employment contract, a change in home port, maritime transport routes, collective employment law, pension entitlements or fiscal law. In light of

[1271] In the sense that the applicable law to their employment contract or the place/country of their habitual employment does not change.

[1272] Still, there is to be a conflict of laws assessment into which of the laws connected with the case is to be applied.

[1273] See Chapter 2.

[1274] Surely, the transfer of land-based undertakings can likewise be coupled with a simultaneous relocation of the undertaking (see, e.g. Ktr. Eindhoven (vrz.) 9 September 2008, *JAR* 2008/271; Ktr. Tilburg 26 July 2007, *JAR* 2007/259; Ktr. Zaandam (vrz.) 26 September 2007, *JAR* 2007/67; LAG Baden-Württemberg 17 September 2009 – 11 Sa 40/09; BAG 26 May 2011 – 8 AZR 37/10; LAG Baden-Württemberg 15 December 2009 – 22 Sa 45/09; LAG Hamburg 22 May 2003 – 8 Sa 29/03; BAG 20 April 1989 – 2 AZR 431/88; Cass. soc. 23 October 1974, *RDIP* 1976, p. 87; *Holis Metal Industries Limited* v. *(1) GMB (2) Newell Limited* [2008] IRLR 187), however this situation is more common where it concerns highly mobile undertakings.

these considerations a question that may arise is whether a change in ownership or flag has any bearing on the applicable law to the effects of a transfer of undertaking.

*4.1 Effect of flagging out*

In determining the applicable law to a transfer of undertaking the question arises whether a simultaneous or subsequent reflagging of the seagoing vessel (to be) transferred has any effect on the law that governs (the effects of) the transfer of undertaking. The answer to this question surely depends on the conflict of laws and the connecting factor utilised to determine the applicable law to the transfer. As follows from the previous Chapter, a change in the applicable law or the allowance of a *conflit mobile* is incompatible with the nature and aim of the Acquired Rights Directive, which is to safeguard the rights of employees employed in European based undertakings. More so, where it concerns land-based undertakings, allowing a change in the applicable law to a transfer of undertaking would negate the entire purpose of the Acquired Rights Directive as it would result in the transfer only having some effect if the laws at the original location and the new location of the undertaking (depending on the time of the relocation) allow for an automatic transfer of the employment relationship and the rights and obligations stemming therefrom. In addition, such an approach is contrary to the territorial scope of the Acquired Rights Directive, reflected in Article 1(2). Article 1(2) merely requires the undertaking *to be transferred* to be located within an EU Member State prior to the transfer. Thus, as appears from the directive, its application is exclusively dependent on the geographical location of the undertaking *to be transferred* and not on the destination of the undertaking upon or after the transfer. This differs where it concerns seagoing vessels as the new Article 1(3) limits the territorial scope of the directive for seagoing vessels by requiring the transferee to be situated or the transferred undertaking to remain situated within a Member State. The latter requirement may be easily fulfilled where it concerns the transfer of shipping companies or the transfer of another type of undertaking where the seagoing vessel is merely part of a larger undertaking to be transferred. However, in situations involving the transfer of a single seagoing vessel that in itself constitutes an undertaking, that undertaking, save for its flag and place of registration, due to its inherent mobility cannot be pinpointed at an exact geographic location, leaving only the requirement that the transferee

must be situated within a Member State. As such, by reason of Article 1(2) and 1(3), in order for the Acquired Rights Directive to apply to the transfer of single seagoing vessels, the undertaking to be transferred as well as the transferee must be situated within a Member State. Here, the continued application of Article 1(2) in relation to seagoing vessels is problematic and underlines the idea that the directive is only intended to apply to seagoing vessels where they are part of the transfer of a larger land-based undertaking, thus excluding the application of the Acquired Rights Directive to single vessel transfers. If this is the case, the repeal of the provision excluding seagoing vessels does not meet its aim of ameliorating the position of seagoing workers since the transfer of shipping companies was already believed to be included in the scope of the Acquired Rights Directive prior to the repeal of the provision excluding seagoing vessels. The new Article 1(3) however clearly refers to the application of the directive to seagoing vessels that are part of the transfer of an undertaking within the meaning of paragraphs 1 and 2 of Article 1. As such, seagoing vessels are not exempt from the existing territorial scope of the directive. In this regard, the freedom of navigation combined with mobility of seagoing vessels forms important concern when it comes to the application of the Acquired Rights Directive. Since the directive applies whenever the undertaking or part of the undertaking to be transferred is situated within the territory of a Member State, the high mobility of seagoing vessels might prevent application of the directive[1275] whenever the vessel is located outside European waters[1276] upon or immediately prior to its transfer. Where the applicability of the Acquired Rights Directive is contingent on physical presence within EU territory a vessel, in cases where it is considered part of a (non-land-based) undertaking, can easily avoid application by venturing outside European waters. By the same token, vessels that are merely passing through European waters may unintentionally be captured by the provisions of the directive, if their transfer constitutes the transfer of an undertaking. Since the purpose of the reform of the Acquired Rights Directive is to better protect those working in the European seafaring industry, the aforementioned occurrences are undesirable. In order to prevent intentional circumvention of the

[1275] I.e. the various national provisions transposing the directive.

[1276] I.e. the combined internal waters, territorial waters and EEZs, including the Continental Shelf, of the Member States.

provisions of the directive and to enhance legal certainty, it would therefore be advisable to amend the present scope of the directive to the extent that it applies to European seagoing vessels irrespective of their location at the time of the transfer. In this a connection to the flag state or the Member State of registration may offer a solution. In earlier times, seagoing vessels were considered part of the territory of the state that determined their nationality.[1277] Even though this is no longer the case, the flag holds a firm connection to a particular state. However, given the risk of flagging out the flag or the place of vessel registration holds an ill-suited connecting factor in determining the application of the Acquired Rights Directive and its national counterparts. Despite certain states imposing strict conditions on vessel registration, there still exist many jurisdictions that make it surprisingly easy to fly their flag.[1278] In fact, shipowners oftentimes utilize these so-called 'flags of convience' a means to cut cost and lower labour standards.[1279] Such flagging out allows them to compete with vessels from developing countries, where labour standards, taxes and crew costs are significantly lower.[1280] As such, it is not unimaginable that abusive reflagging is utilized as a means to avoid vessels (that constitute part of a non-land-based undertaking) from being subject to the Acquired Rights Directive and its national counterparts. If in cases of a cross-border transfer of seagoing vessels connection were sought to the flag state the transferor and/or transferee could purposely circumvent the application of the Acquired Rights Directive by subjecting the transferred vessel to the flag of a country with lower or difficultly enforced labour standards. To this end, a prior, simultaneous or subsequent reflagging of the seagoing vessel (to be) transferred should have no bearing on the application of the provisions stemming from the Acquired Rights Directive and the applicable law to the transfer of a seagoing vessel.

[1277] *Cf.* Ludewig 2012, p. 92-93; Franzen 1994, p. 91-92; Junker 2006, p. 407; Jensen 2006, p. 11.
[1278] *Cf.* Case C-438/05 *Viking* [2007] ECR I 10779, ECLI:EU:C:2007:772; Saydé 2014, p. 166; Hendrickx & Pecinovsky 2015 p. 132.
[1279] Barnard 2006, p. 274.
[1280] Dimitrova 2010, p. 17; OECD, *International Regulatory Co-operation and International Organistations. The cases of the OECD and the IMO,* OECD Publishing [2016] p. 87.

*4.2 Preferred conflict of laws approach*

In the previous Chapter, I have established that the issue of (cross-border) transfers of undertakings requires a separate category under the conflict of laws for which connection should be sought to the location of the undertaking to be transferred. In doing so I held that the preferred conflict of laws reference for transfers of undertakings should read:

> 'a transfer of undertaking shall be governed by the law of the country in which the undertaking to be transferred is situated upon or immediately prior to the transfer.'

The primary aim of the present Chapter is to assess whether this proposed conflict of laws reference requires any change due to the recent revision of Article 1(3) Acquired Rights Directive and the inclusion of seagoing vessels. The proposed conflict of laws provision is, in part, derived from the territorial scope of the Acquired Rights Directive. This scope equally applies to the transfer of seagoing vessels that are part of the transfer of an undertaking. In relation to seagoing vessels however, as outlined in the previous paragraph, the dependency on the geographical situation of the undertaking to be transferred appears unsuited. To this end, problems will arise especially in situations where a single vessel constitutes an undertaking within the meaning of the Acquired Rights Directive. Due to the inherent mobility of seagoing vessels and the concomitant ease with which acquired rights provisions may purposefully be circumvented a different connecting factor should determine the applicable law to the transfer of seagoing vessels. Such a connecting factor should only apply in situations where the vessel is not considered part of a larger, land-based undertaking. Where this is the case the conflict of laws solution proposed in the previous Chapter is to prevail. As such, where a seagoing vessel is transferred as part of a land-based undertaking the location of this land-based undertaking upon or immediately prior to the transfer is decisive in determining the applicable law to the (effects of a) transfer of undertaking.

Instead of determining the territorial scope of national acquired rights provisions, the conflict of laws reference for the transfer of seagoing vessels should in itself designate the law that governs (the effects of) a transfer of undertaking. The notion that, due to the inherent mobility of seagoing

vessels, the application of national acquired rights provisions may not be contingent upon the location of the vessel to be transferred, was recognized by the European Commission in its second consultation of social partners on the revision of the exclusion of seagoing workers in the Acquired Rights Directive.[1281] The Commission held that the existing scope rule should not be applied to seagoing vessels, 'which may be transferred while they are outside the territorial scope of the Treaty.' In its original proposal, the Commission therefore proposed a different scope for seagoing vessels by making the application of the directive dependent on the seagoing vessel being registered in and/or flying the flag of a Member State, regardless of the location of the seagoing vessel upon the transfer. As such, the proposed directive was to apply to the transfer of a seagoing vessel 'even when it is not situated within the territorial scope of the Treaty.'[1282] The proposed provision equals the view that seagoing vessels flying an EU flag, regardless of their location at the time of the transfer should be included in the Acquired Rights Directive, as portrayed in the impact assessment for the European Commission.[1283] However, the risk of flagging out forms a major downside to predicating the applicability of acquired rights provisions on the flag. This downside is not outweighed by the flag's easy determination or its significance in maritime law. It should therefore be preferred to revise the scope of the directive as to include seagoing vessels (that are part of an undertaking) that are operated and controlled from a Member State (prior to their transfer).[1284] Whilst navigating the legal limbo of the high seas the state from which the vessel is actually operated and controlled forms the one true continuous connection to any particular state. In addition, connection to that state would hold true to the approach proposed for on shore undertakings;

[1281] Reassessing the regulatory social framework for more and better seafaring jobs in the EU: Second consultation of the European social partners on the revision of exclusions concerning seafaring workers contained in Directives 2008/94/EC, 94/45/EC, 2002/14/EC, 98/56/EC, 2001/23/EC and 96/71/EC [2009], p. 8.

[1282] Article 5 COM (2013) 798 final.

[1283] *Cf.* Impact assessment, p. 83. It is curious that in the final adopted directive the existing scope of the directive (seeking connection to the location of the undertaking) is maintained where it concerns the transfer of seagoing vessels that are part of an undertaking, especially since the Commission in its earlier proposal recognized the downsides of predicating the application of the directive on the geographic location of the undertaking (i.e. vessel) to be transferred.

[1284] *Cf.* Henckel 2012.

whereas the *locus* or geographic situation of the vessel is subject to constant change, the place from which the vessel is operated and controlled is easily determined. Moreover, this connecting factor sits well with the directive as it applies whenever there is a change in the natural or legal person *responsible for carrying on the business*.[1285] The application of this criterion will often lead to a similar outcome as the application of the criterion of the habitual place of performance in the determination of the law applicable to the employment contract, resulting in a certain congruence between the law that governs the employment contract and the law that governs the effects of a transfer of undertaking. The preference of a separate conflict of laws category under which connection is sought to the place from where the undertaking is operated and controlled over the assimilation under the individual employment contract lies first in the fact that a transfer of undertaking occurs by operation of law rather than being the result of contractual negotiations between the transferee and the affected employees. Second, the effect of a transfer of undertaking surpasses the individual employment relationship, which therefore holds an ill-suited connection under the conflict of laws. The connection to the individual employment contract is at odds with the nature and aim of the Acquired Rights Directive as the latter seeks to ensure the continuance of individual and collective employment rights as well as inhabits certain internal market considerations. In effect, the reasons for rejecting the connection to the individual employment contract for transfers of seagoing vessels that are part of an undertaking are the same as the reasons underlying this rejection for land-based undertaking. However, as appears from the previous Chapter, where it concerns land-based undertakings an additional argument for the rejection of the connection to the individual employment contract was found in the possible lengthy assessment of seeking the habitual place of employment. This reasoning does not apply to the conflict of laws solution proposed for seagoing vessels. In effect, the proposed conflict of laws solution bears similarity to the tools provided by the ECJ in establishing the habitual place of employment for highly mobile undertakings.[1286] Yet, the proposed conflict

[1285] *Cf.* Case 287/86 *Ny Mølle Kro* [1987] ECR 5465, ECLI:EU:C:1987:573, para. 12; Joined Cases C-232/04 and C-233/04 *Securicor* [2005] ECR I-11237, ECLI:EU:C:2005:778, para. 31.

[1286] *Cf.* Case C-384/10 *Jan Voogsgeerd v Navimer Sa* [2011] ECLI:EU:C:2011:842, para. 40.

of laws solution for the transfer of seagoing vessels that are part of an undertaking is slightly more easily determined as the aim is not to find the place where the employee habitually discharges his tasks towards his employer, but to locate the place from where the undertaking (not the employee) is operated and controlled. Still, one could argue that the connection to the flag state would prove a more easily determined connecting factor. However, given the real risk of abusive reflagging tactics such connection appears undesirable. In order to avoid this undesired effect one could, akin to Article 91 of the United Nations Convention on the Law of the Sea, establish a genuine link-test in the sense that if the flag state does not provide a genuine link to the place from where the undertaking is operated and controlled the latter should prevail. Such a solution may seem preferable in light of the ease of determination of the flag state, in reality however this solution requires a continued factual assessment of whether such a genuine link exists.[1287] More so, disguised behind the connection to the flag state, such a conflict rule still requires the application of the laws of the place from where the undertaking is operated and controlled, which in relation to seagoing vessels forms the one continuous link to any single country.

Since the employees cannot in any way influence the change in the person of their employer they require their interests and the rights and obligations stemming from their employment contract to be protected. In this, the location of the undertaking after (completion of) the transfer should remain immaterial. The fact that the directive encompasses transfers of undertakings to non-Member States will, on occasion, undoubtedly result in the laws of the country of the transferee not being equipped with (similar) acquired rights provisions. The existence of these provisions therefore does not form a requirement for the application of the Acquired Rights Directive and its national counterparts. Where it concerns seagoing vessels the dependency upon the location of the transferee puzzles me. I see no reason why the Acquired Rights Directive and its national counterparts should be prevented

[1287] See for the problems surrounding the genuine link requirement under UNCLOS: R. Churchill, *'The meaning of the 'genuine link' requirement in relation to the nationality of ships. A study prepared for the international transport worker's federation'* [2000], not only is there is no consensus as to what is meant by a genuine link, there is also no single criterion by which the genuineness of a link can be established (p. 4).

from applying in situations involving the outbound transfer of a seagoing vessel. After all, the entire notion underlying the directive is to protect those who are employed in the European seafaring industry and to secure the continuation of the rights and obligations arising from their employment relationship. Here, the idea is to secure the application of the *existing* employment rights and not to better the position of the affected employees. More so, the reasons underlying the repeal of the exclusion of seagoing vessels are based in creating a level playing field for maritime employees and allowing them a position equal to that of on shore employees. By requiring a dependency upon the location of the transferee for situations involving the transfer of seagoing vessels only, the directive fails to secure this aim.

In light of the foregoing, due to the special nature of seagoing vessels, the conflict of laws solution proposed in the previous Chapter requires an addition rather than a revision. Such an addition could take the following shape:

> 'a transfer of a seagoing vessel that constitutes a transfer of an undertaking, business or part of an undertaking or business shall be governed by the law of the Member State from which the undertaking to be transferred is actually operated and controlled upon or immediately prior to the transfer.'

In order for this provision to have full effect, the territorial scope of the Acquired Rights Directive should additionally be amended, likening the territorial scope for land-based undertakings, to the extent that the directive applies in so far as the seagoing vessel to be transferred is operated and controlled from a Member State, i.e. a location within the territorial scope of the Treaty. Another solution would be to repeal the provision on the territorial scope of the Acquired Rights Directive and instead allowing the conflict of laws reference for the transfer of (seagoing) undertakings to designate the law that governs (the effects of) a transfer of undertaking. After all, the proposed conflict of laws provisions do justice to the preferred territorial scope of the directive.

# Chapter 6 – Conclusion

In recent history, globalisation and market integration[1288] have shaped the economic climate in such a way as to give rise to a considerable increase in cross-border mergers, acquisitions and corporate restructurings. On a European plane, continued integration serves as a catalyst to the incessant enhancement of corporate mobility.[1289] In light of this rise in corporate mobility, the employment effects of cross-border corporate mobility, especially where it concerns cross-border mergers, acquisitions and corporate restructurings may be considered issues of significant practical relevance.[1290] It are issues of employment protection in the event of a change in employer as a result of a legal transfer or merger that lie at the heart of the present research. More precisely, the present research holds a strong focus on the employment effects of a cross-border transfer of undertaking coupled with a cross-border relocation and, even more specifically, on the applicable law and appropriate court in the event of a dispute arising from such a transfer. Throughout Europe, the Acquired Rights Directive[1291] provides for the safeguarding of employees rights upon a transfer of undertaking. In essence, the directive, through e.g. the *ope legis* transfer of rights and obligations stemming from the employment contract to the new employer,[1292] seeks to ensure that employees do not forfeit vital rights acquired prior to the change in employer.[1293] Although the directive applies throughout the Member States of the European Union, it only aims to effectuate partial and minimum harmonization and is not established to provide a uniform level of employment protection on the basis of common criteria.[1294] As an inevitable result of partial and minimum harmonization, the laws of the Member States naturally differ, resulting in issues of

[1288] E.g. capital, labour and services markets.

[1289] Commission services' working document. Memorandum on rights of workers in cases of transfers of undertakings [2004].

[1290] See Chapter 1.

[1291] Council Directive (EC) 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses [2001] OJ L82/16

[1292] Article 3(1) Acquired Rights Directive.

[1293] COM(74) 351, p. 3.

[1294] C-105/84 *Foreningen af Arbejdsledere i Danmark v A/S Danmols Inventar* [1985] ECR 331, ECLI:EU:C:1985:331, para. 16.

conflicting laws in the event of a cross-border transfer of undertaking.[1295] After all, as is its nature, the directive is not directly applicable between private actors within the Member States, rather its application is secured by means of transposition into national law. It are national implementation provisions, not the directive itself, that are to apply in situations involving a transfer of undertaking. These provisions tend to be geared towards domestic transfers of undertakings rather than dealing with cross-border transfer scenarios.[1296] More so, the directive facilitates significant differences in the laws of the Member States by leaving several key concepts, such as employee, to be defined by national law.[1297] In addition, the optional nature of several (parts) of the provisions stemming from the directive, such as those on collective agreements,[1298] supplementary pension schemes[1299] and insolvency,[1300] aids the divergence in national laws.[1301] Any cross-border transfer of undertaking may consequently give rise to an excess of questions of a preponderantly private international law nature. In cross-border transfer scenarios, it is essential to establish which national acquired rights provisions are to prevail in situations involving a conflict between the acquired rights laws existing in the country of origin, at the location of the undertaking to be transferred and in the country of relocation. Since, the place of adjudication holds the key to determining the applicable law, an additional question of importance is which courts are competent to adjudicate a transfer-related dispute. These questions are closely related to the aim of the present dissertation, which is to establish the necessity, desirability and (possible) shaping of private international law provisions, in the areas of jurisdiction and the conflict of laws, for (cross-border) transfers of undertakings. In pursuing this aim, the bulk of the present work is dedicated to providing a critical evaluation of the Acquired Rights Directive and the existing private international law instruments for (disputes arising from) transfers of undertakings. This critical evaluation has shown that the existing private international law regime does not sufficiently cater for issues arising from cross-border transfers of undertakings and oftentimes fails to do justice to the nature and purpose of the Acquired Rights Directive. Building

[1295] See Chapter 2.
[1296] Reiner 2010.
[1297] Art. 2(1), Art. 2(2) Acquired Rights Directive; See Chapter 2, paragraph 3.
[1298] Art. 3(3) Acquired Rights Directive
[1299] Art. 3(4)Acquired Rights Directive
[1300] Art. 5 Acquired Rights Directive.
[1301] See Chapter 2.

on this, the purpose of the present Chapter is to provide an overview and captious assessment of the findings in the previous Chapters in addition to providing recommendations of a private international law nature.

## 1. Cross-border transfers of undertakings

A proper understanding of the present research requires a clear working definition of the term cross-border transfer of undertaking. Several types of cross-border transfer scenarios can be distinguished. In essence, any cross-border transfer of undertaking requires some foreign element. This foreign element may either lie in the person of the transferee[1302] or the location of the undertaking upon or after the transfer. For the purposes of this research however, cross-border transfers of undertakings are characterized as transfers of undertakings involving a cross-border relocation of the transferred undertaking. To this end, three types of transfer scenarios are identified: the intra-European transfer, the outbound transfer and the inbound transfer. The intra-European transfer scenario involves a transfer between EU Member States, whereas an outbound transfer scenario sees to the situation in which an undertaking is transferred and relocated from a Member State to a non-Member State. The inbound transfer scenario deals with the reverse situation, i.e. where an undertaking is transferred and relocated from a non-Member State to a Member State of the European Union. Since the Acquired Rights Directive by reason of Article 1(2) only applies only to intra-European and outbound transfer scenarios, they hold the emphasis of the present research. In other words, upon a transfer of undertaking, the Acquired Rights Directive seeks to safeguard the rights of employees (previously) employed in European based undertakings; undertakings that transfer from a third state to a European Member State are outside the remit of the directive. Thus, the territorial scope of the directive

[1302] This type of transfer scenario is however not included in the current research. After all, under this scenario there will be little to no change in the working conditions due to the nationality (or *lex societatis*) of the transferee. In fact, the transfer of undertaking does not differ from a transfer to a domestic transferee; the transferred employees will continue their employment on the exact terms and conditions that existed with the transferor, this includes the location of the performance of their obligations towards their employer, i.e. their place of work. Although in these cases, the parties may rely on the instruments of private international law since the internationality requirement is fulfilled, the actual and legal position of the affected employees is unlikely to change.

ensures that its provisions apply in both intra-European and outbound transfer scenarios. In considering the application of the directive, the location of the undertaking to be transferred is paramount. If the undertaking *to be transferred* is located within the territory of the European Union[1303] the Acquired Rights Directive will yield application.

A transfer of undertaking is not precluded from the application of the Acquired Rights Directive and its national counterparts by reason of its cross-border nature.[1304] In this sense, cross-border transfers of undertakings do not differ from transfers of undertakings that are effectuated within national borders. The application of the directive is primarily contingent upon the transfer of a stable economic entity[1305] that retains its identity.[1306] This transfer comprises any change in the natural or legal person responsible for carrying on the business[1307] and does not require the existence of a contractual agreement between transferor and transferee. A transfer therefore includes a wide variety of cross-border commercial transactions including e.g. a simple contractual business sale, service provision changes, outsourcing transactions, mergers, demergers, court decisions and leasing

[1303] See Article 1(2) of the Acquired Rights Directive (Directive 20001/23/EC), according to which the undertaking to be transferred must be situated within the territorial scope of the Treaty, i.e. the Treaty on the European Union and the Treaty on the Functioning of the European Union (*cf.* Article 52 TEU and Article 355 TFEU). As a rule of thumb, EU law governs the entire European territory of the Member States.

[1304] As is clear from Article 1(2), which predicates the application of the directive upon the geographic situation of the undertaking to be transferred. For an undertaking to be captured by the provisions of the directive this undertaking must be situated within the territorial scope of the Treaty.

[1305] The matter of financing or legal status of the undertaking are immaterial to this equation: Case CV-108/10 *Scattalon* [2011] ECLI:EU:C:2011:542, para. 42; Joined cases C-127/96, C-229/96 and C-74/97 *Hernández Vidal* [1998] ECR I-8179, ECLI:EU:C:1998:594, para.26- 27; Case C-175/99 Mayeur [2000] ECR I-7755, ECLI:EU:C:2000:505, para.32; see also, with regard to Article 1(1) Acquired Rights Directive: Case C-458/05 *Jouini and Others* [2007] ECR I-7301, ECLI:EU:C:2007:512, para. 31, and Case C-151/09 *Federación de Servicios Públicos de la UGT (UGT-FSP) v Ayuntamiento de La Línea de la Concepción, María del Rosario Vecino Uribe en Ministerio Fiscal* [2010] ECLI:EU:C:2010:452, paragraph 26.

[1306] Article 1(1)(a) Acquired Rights Directive.

[1307] Joined Cases C-171/94 and C-172/94 *Albert Merckx and Patrick Neuhuys v Ford Motors Company Belgium SA* [1996] *ECR* I – 1267, ECLI:EU:C:1996:87, para. 28; Case C 29/91 *Dr. Sophie Redmond Stichting v Hendrikus Bartol and others* [1992] ECR I-3189, ECLI:EU:C:1992:220, para. 10-11.

agreements.[1308] An important difference between domestic transfers and transfers of undertaking coupled with a cross-border relocation of the undertaking is that the latter type of transfer will generally subject the affected employees to a different social, economic and legal environment. Such a change however, does not *per se* prevent a transfer of undertaking from taking effect. In cross-border transfer scenarios, the question of whether a transfer has occurred is to be assessed on the basis of the same factors that apply to domestic transfer situations: the retention of identity-test applies to domestic and cross-border transfer scenarios alike. Under this seven-headed test, relying on the so-called *Spijkers*-factors[1309] it has to be determined whether the business or undertaking was transferred as a going concern and has retained its identity after the transfer. In its seminal judgment in *Spijkers* the ECJ ruled that in deciding whether an undertaking has retained its identity the national court has to take into account all the circumstances that characterise the undertaking in question such as (a) the type of undertaking or business, (b) the transfer of tangible assets, (c) the value of intangible assets, (d) the transfer of the majority of the employees, (e) the transfer of customers as well as (f) the degree of similarity between the activities carried on before and after the transfer and (g) the period, if any, for which the activities were suspended. All of these circumstances are single factors in an overall assessment and cannot be considered in isolation.[1310] This seven-factor test, which does not require the cumulative application of all factors, applies to cross-border transfers of undertakings in the same way as it does to domestic transfers. The relocation to a different social, economic and legal environment does not affect the application of the retention of identity-test. The notion that such a change in environment may cause an undertaking to lose its identity does not fit in well with the existing regime and would defeat the entire purpose of the Acquired Rights Directive.[1311] A 'change in environment-test' is uneasily reconciled with the strictly applied *Spijkers*-factors. The Acquired Rights Directive does not presently give rise to a distinction between domestic and cross-border transfers of undertakings resulting in a justification for adopting additional

[1308] Case 135/83 *Arie Botzen en anderen v Rotterdamsche Droogdok Maatschappij BV* [1985] ECR 519, ECLI:EU:C:1985:58.

[1309] Case 24/85 *Spijkers v Benedik* [1986] *ECR* 1119, ECLI:EU:C:1986:127.

[1310] Case 24/85 *Spijkers v Benedik* [1986] *ECR* 1119, ECLI:EU:C:1986:127., para. 13.

[1311] *Contra* CMS report 2006, p. 17, *Cf.* Cass. soc., 5 April 1995, n° 93-42.690; Cour de Lyon, Ch. Soc. 11 May 1993, *Dr. Soc.* 1993, p. 650 ; See Chapter 2, para. 4 ; *Cf.* Niksova 2014, p. 25.

tests in relation to cross-border transfer scenarios. Moreover, it would be inequitable to deprive the affected employees of the protection afforded by the directive simply due to the fact that, without their control, the transfer takes place across national borders. If the *Spijkers*-factors have been fulfilled, there is a transfer of a going concern and the undertaking transferred retains its identity.[1312] Still, in cross-border transfer scenarios an undertaking may, on occasion, due to the cross-border relocation of the undertaking, be prevented from retaining its identity. This may for example be the case in situations where an undertaking is location-dependent or relies heavily on a particular client base that is inextricably linked to the location of the undertaking. Even though the retention of identity-test applies to domestic and cross-border transfer scenarios alike, it appears that it will be more difficult to satisfy the *Spijkers* factors upon a cross-border transfer of undertaking, since the transfer of key factors such as employees are likely to be amiss.[1313] Still, once a retention of identity has been assumed, which is not improbable in cross-border transfer scenarios, the employees will be entitled to the protection afforded by the directive and its national counterparts. Once it has been established that there has been a transfer, by reason of legal transfer or merger, of an undertaking that has retained its identity, the Acquired Rights Directive and its national counterparts will take effect, provided that the territorial[1314] and personal scope of the directive[1315] are additionally satisfied.

## 2. Jurisdiction

At a certain point, cross-border transfers of undertakings are bound to give rise to disputes. A matter that is intrinsically linked to such disputes is that of

[1312] The fact that the affected employees, as a result of a relocation may become subject to a different environment that is detrimental to their working conditions should however not be overlooked. In these situations, the employees should be able to rely on Article 4(2) of the Acquired Rights Directive, allowing them to treat their objection to the transfer as a dismissal by their employer.

[1313] In many cases employees may not wish to transfer to continue their employment with the transferee and will as such object to the transfer of their employment relationship. This may be different where it concerns transfers of undertakings in areas near national borders, See Chapter 2, para. 4.

[1314] Article 1(2) Acquired Rights Directive: the undertaking to be transferred must be situated within the Member State.

[1315] Article 2(1), 2(2) Acquired Rights Directive: those who are protected as employees under the laws of the Member State in question.

international jurisdiction. In the event of a dispute arising from a transfer of undertaking all actors involved in the transfer must be able to turn to a particular court in order to enforce the rights and obligations stemming from the transfer. The choice for any such court, should such a choice exist, is one of particular importance as it is the court seised of the matter that, on the basis of its own rules of private international law, determines the applicable law. Due to the nature of the Acquired Rights Directive, being one of partial harmonisation, there does not exist a uniform level of employment protection throughout the Member States. Consequently, even in intra-European transfer scenarios, it is of considerable importance for the plaintiff to, from his perspective, be able to secure adjudication in the courts of the Member States that will provide the most advantageous outcome to the dispute. Thus, although the question of international jurisdiction is one that is frequently overlooked when discussing cross-border transfers of undertakings, its importance should not be ignored. Where it concerns cross-border transfer scenarios, it is vital to establish the court that has international jurisdiction in the event of a dispute arising from the transfer.

*2.1 Effectiveness of existing instruments*

The Acquired Rights Directive itself holds no provisions on international jurisdiction. As a result, the competent court, in disputes arising from a cross-border transfer of undertaking, throughout the Member States, has to be established on the basis of the Brussels I Recast. While the classification of all claims stemming from a transfer of undertaking as civil and commercial matters[1316] may prove troublesome at times, these claims generally befall the substantive scope of the regulation, except where they pertain to the exercise of public authority. Since the Brussels I Recast does not include a special jurisdictional category for transfers of undertakings, all claims arising therefrom are accommodated within the existing provisions of the regulation. In other words, the Brussels I Recast does not offer a single jurisdictional basis for all transfer-related claims, but instead, divides them among several Articles on jurisdiction on the basis of the instituted claim. To this end, the concurrence of the claims arising from a transfer of undertaking under a single rule or category of jurisdiction might be preferred, however, the Brussels I Recast leaves no room for such concurrence of claims other

[1316] The problem with this classification lies in the semi-public nature of some parts of a transfer of undertaking, especially where it concerns the preservation of status and function of employee representatives, since in some Member States, e.g. Belgium, the application of such provisions is enforced by administrative fines.

than under the general rule which attributes jurisdiction to the *forum rei*. Subsuming all transfer-related claims under this general category would conflict with the protective nature of the Acquired Rights Directive and would defy procedural efficiency and fairness by conceivably resulting in a loss of proximity between the adjudicating court and the dispute and the loss of a multiplicity of competent courts for the affected employees. Subsuming all transfer-related claims under the category for individual employment contracts, which is a common argument within the area of the conflict of laws, does not offer a solution either. After all, in addition to individual interests the Acquired Rights Directive and its national counterparts inhabit certain operational, economic and collective employment interests which are difficult to reconcile with the special rules on jurisdiction for disputes relating to individual employment contracts. Under the Brussels I recast, the various claims that might arise from a transfer of undertaking are therefore subject to different rules on jurisdiction. Whereas some plaintiffs will have to make due with the general rule of Article 4, awarding jurisdiction to the domicile of the defendant, others can seek refuge in the variety of jurisdictional bases offered by the special jurisdictional category for individual contracts of employment.[1317] In most cases, although a classification of transfer-related claims may prove difficult, these jurisdictional bases offer sufficient access to justice and do not require an alternative or additional jurisdictional path for claims arising from cross-border transfers of undertakings. In some cases however, the existing regime does not appear satisfactory in light of procedural efficiency and the nature and aim of the Acquired Rights Directive. After all, the directive seeks to secure the acquired rights of employees working in European-based undertakings upon the transfer of the undertaking in which they are employed. Under application of the Brussels regime, claims arising from the transfer of a European-based undertaking may be outside the scope of the Brussels I Recast despite the existence of a sufficiently close connection between the dispute and a Member State court.

In outbound transfer scenarios it may be impossible to initiate proceedings against a foreign transferee before a Member State court on the basis of the Brussels I Recast. This is the case where the transferee is domiciled in a non-

[1317] See Chapter 3.

Member State[1318] and neither the new habitual place of employment[1319] nor the undertaking as a secondary establishment[1320] is situated in a Member State. In addition, employees will not be able to sue both transferor and transferee in composite proceedings as Article 8 Brussels I Recast requires co-defendants to be domiciled in a Member State. As such, in outbound transfer scenarios the Brussels I Recast is unable to provide a competent court. Where it concerns claims arising from a transfer of a European-based undertaking the absence of jurisdiction of the courts of a Member State is an entirely unacceptable result. After all, in outbound transfer scenarios the undertaking to be transferred is located within a Member State. Prior to the cross-border transfer of undertaking the affected employees are likely to habitually carry out their employment within the Member State of origin.[1321] It are the transferor and transferee who by reason of the transfer, have willingly subjected themselves to the legal sphere of another Member State.[1322] The employees however cannot exert any influence over the effectuation of the transfer, the person of the transferee or the location of the transferred undertaking upon or immediately after the transfer. On the date of the transfer all rights and obligations stemming from the employment contract transfer to the transferee by operation of law.[1323] Such a transfer is initiated within the Member State where the undertaking to be transferred is located. In the absence of a Member State court having jurisdiction there exists no geographic proximity to the undertaking being transferred as pivot of the Acquired Rights Directive, which conflicts with the latter's employee protective nature. In conclusion, although impervious at times, the Brussels I Recast in most transfer-related cases provides sufficient access to justice. However, in certain specific cases, most notably in relation to non-Member

[1318] The application of the Regulation is formally contingent on the defendant being domiciled in a Member State, except in a few distinct situations where a sufficient connection to a Member State exists on the basis of another factor, e.g. where it concerns individual contracts of employment.

[1319] Article 20(2) Brussels I Recast

[1320] Article 21(2) Brussels I Recast.

[1321] This former habitual place of performance does provide a ground for jurisdiction against the transferor, but holds no significance in establishing the competent court in situations involving a claim against the transferee. In the latter case the new habitual place of employment is to be decisive.

[1322] Generally, the transferor will have agreed to the (foreign) person of the transferee or the cross-border relocation that accompanies the transfer, whereas the transferee has voluntarily acquired a European-based undertaking.

[1323] Article 3(1) Acquired Rights Directive.

State defendants (in all likelihood the transferee), the provisions of the Brussels I Recast provide a highly unsatisfactory result. These cases do not go along with the existing jurisdictional regime.

*2.2 Preferred jurisdictional path*

In light of the problems relating to the absence of jurisdiction of Member State courts in outbound transfer scenarios and other difficulties relating to a lack of proximity existing between the competent court and the transfer-related dispute, the present research proposes an additional ground for jurisdiction. Although, under the Brussels I Recast, it may be difficult to allocate the appropriate jurisdictional rule for specific transfer-related claims, the Brussels regime generally provides sufficient access to justice. Therefore, rather than providing a new, separate jurisdictional category for transfers of undertakings, it is preferred to provide an additional ground for jurisdiction within the Acquired Rights Directive. This rule should serve as a single (additional) jurisdictional base for all claims seeking to enforce rights and obligations stemming from a transfer of undertaking. The added benefit of such a single jurisdictional basis for transfer-related claims lies in the fact that it, in some cases, alleviates the strenuous task of classifying each transfer-related claim as belonging to a specific jurisdictional category under the Brussels I Recast. Claims arising from a transfer of undertaking would benefit from a jurisdictional rule that is not plagued by complexity and ambiguity, that has the advantage of being easily applicable and of providing legal certainty and predictability. Since the undertaking to be transferred is pivotal to a cross-border transfer of undertaking, it is desirable to attribute jurisdiction to the courts at the location of this undertaking. Leaving these courts as sole adjudicators in the event of a transfer-related dispute would however result in the loss of the multiplicity of jurisdictional bases presently available to the affected employees and may as such result in a deterioration of their legal position, which would be contrary to the employee protective nature of the Acquired Rights Directive. As such, the Acquired Rights Directive should, akin to the Posting of Workers Directive,[1324] include a rule

[1324] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services *OJ* [1997] L18/1, which in Article 6 provides a specific provision on jurisdiction; *Cf.* the upcoming revision of the Posting of Workers Directive: Proposal for a Directive of the European Parliament and of the Council amending Directive 96/71/EC of The European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services COM(2016) 128 final.

on jurisdiction additional to those already existing within the Brussels regime.

## 3. Conflict of laws

The emphasis of the present research lies in the establishment of the applicable law to a transfer of undertaking. Given the absence of EU competence in effectuating a unification of the labour laws of the Member States[1325] the Acquired Rights Directive seeks to establish an approximation of laws by means of partial and minimum harmonisation.[1326] As a result, Member State laws provide minimum standards of employment protection that may only be departed from *in melius.*[1327] In effect, the Acquired Rights Directive has facilitated legal diversity by allowing the Member States to impose more favourable measures and to choose from several optional measures within the directive. In addition, the directive leaves key concepts, such as employee, to be defined by national law. Consequently, there exist wide variations in the national employment protection regimes, leaving the conflict of laws rules to play a crucial role in establishing the appropriate legal regime in cross-border transfer situations. The issue of cross-border transfers of undertakings is therefore inextricably linked to the conflict of laws.

### *3.1 Views and theories*

There exist many different views and theories on the proper conflict of laws path for transfers of undertakings, none of which are universally accepted. While some of the conflict of laws views hold obvious merits, others are easily rejected. For example, the view seeking connection to the transfer

[1325] The founding treaties did not confer any competence on the EU to enact legislation in the field of labour law save for the free movement of workers. Labour law legislation was therefore enacted on the basis of the competence existing for the internal market. The Single European Act provided the EU with the power to establish legislation with regard to employment health and safety in Article 118a EC whereas Article 153(1) TFEU, introduced by the Treaty of Amsterdam, provides the EU with a supportive and complementary competence allowing the enactment of directives effectuating partial harmonization. See: Mańko 2015, p. 9-10; Riesenhuber 2012, p. 141.

[1326] *Cf.* Hepple 2005, p. 190.

[1327] Article 8 Directive 2001/23/EC allows the Member States to apply or introduce laws that are more favourable to the affected employees; Article 7 Directive 77/187/EEC; Guibboni 2006, p. 235 et seq.

agreement clearly conflicts with the aim and purpose of the Acquired Rights Directive as it makes the application of acquired rights provisions contingent on the will of transferor and transferee. Another view, which seeks to conflictually divide the rights and obligations stemming from a transfer of undertaking appears to frustrate legal certainty. Both these views should be discounted in the search for the most befitting conflict of laws solution in cases of transfers of undertakings. In essence there exist two main views on the preferred conflict of laws connection for transfers of undertakings:[1328] the connection to the individual employment contract and the connection to the location of the undertaking to be transferred. In the prevailing opinion a transfer of undertaking and the rights and obligations stemming therefrom are to be governed by the law that governs the individual contract of employment.[1329] The rationalization of this connection is primarily found in the employee-protective nature of the Acquired Rights Directive.[1330] The main purpose of the Acquired Rights Directive, which is to secure a continuance of the rights and obligations stemming from an employment contract or relationship, is considered to justify the conflict of laws connection to the individual employment contract. A connection to the location of the undertaking to be transferred is however better suited to deal with issues of conflicting laws in the event of a cross-border transfer of undertaking. While primarily intended to protect the individual employee, the effects of a transfer of undertaking surpass the individual employment relationship and extend to operational, economic and collective employment interests as well as internal market considerations. Where it concerns these interests the individual employment contract forms an unsuitable conflict of laws connection. It is not the individual employment relationship, but the undertaking to be transferred that forms the pivot of the Acquired Rights Directive. The seat of this undertaking therefore holds the most sensible connecting factor. It is the directive that centers around this undertaking with its provisions only becoming operative if the transfer of an undertaking is to take effect. A connection to the location of the undertaking to be transferred is additionally supported by the territorial scope of the Acquired Rights Directive. It is Article 1(2) of the directive that attributes special meaning to the seat of the undertaking by causing the directive to apply 'where and in so far as the undertaking, business or part of the undertaking or business to be

[1328] *Cf.* Bittner 2000, p. 460.

[1329] See case law Germany, the Netherlands, France, Belgium *Contra:* UK, Luxembourg, Malta.

[1330] Junker 2012, p. 13.

transferred *is situated* within the territorial scope of the Treaty'.[1331] Contrary to a connection to the individual employment contract the seat of the undertaking to be transferred is easily determined and entails a neutral connection that is closely connected to the transfer of an *undertaking.*

*3.2 Effectiveness of existing instruments*

Under the prevailing opinion, which seeks connection to the individual employment contract,
the Rome I Regulation by reason of Article 8 is considered to determine the applicable law to a cross-border transfer of undertaking. This, however, is a false assumption, since the Rome I Regulation does not substantively apply to transfers of undertakings as these are effectuated by operation of law rather than being the result of contractual dealings.[1332] A transfer of undertaking constitutes a separate legal concept that falls outside the scope of the Rome I Regulation.[1333] More so, the provision existing for individual employment contracts is ill-equipped to deal with the more collective aspects of a transfer of undertaking and the determination of the applicable law on the basis of Article 8 Rome I Regulation may, at times, be a difficult and time-consuming process.[1334] The connection to this conflict of laws category thus results in numerous difficulties and ambiguities in relation to a transfer of undertaking. One of the primary problems being that a strict application of the conflict of laws provision for individual employment contracts gives rise to a *conflit mobile* upon the relocation of the undertaking abroad. Such a change in applicable law is entirely incompatible with the aim and purpose of the Acquired Rights Directive and its national counterparts.[1335] The problems arising from such a *conflit mobile* are not solved by the doctrine of overriding mandatory provisions or the scope rule contained in Article 1(2) of the Acquired Rights Directive. In fact there exists significant uncertainty on whether national acquired rights provisions may be applied as overriding mandatory provisions on the basis of Article 9 or Article 23 of the Rome I Regulation whenever the connection to the individual employment contract does not point towards the laws of a Member State despite the undertaking to be transferred falling within the ambit of the directive. The provisions

[1331] Emphasis added KCH.
[1332] See above, para. 4.1 of Chapter 4.
[1333] Under the prevailing opinion, however, the Rome I Regulation determines the applicable law to a transfer of undertaking.
[1334] See above, para. 4.3 of Chapter 4.
[1335] See para. 8.5 of Chapter 4.

stemming from the Acquired Rights Directive to not appear to be caught by the strict definition of overriding mandatory provisions that exists within the Rome I Regulation. After all, these provisions, although partly rooted in internal market considerations[1336] and collective interest, primarily seek to protect the employees affected by a transfer of undertaking.[1337] The dogmatic distinction of whether a provision is considered overriding mandatory may appear immaterial whenever a provision is equipped with a distinct scope rule such as the one encompassed by Article 1(2) Acquired Rights Directive. However, it is the ambiguity of this scope rule that aggravates the difficulty of assessing the proper conflict of laws path for transfers of undertakings. Since the classification as overriding mandatory cannot stem from the directive itself,[1338] it is left to the Member States to determine whether their national acquired rights provisions require application on an overriding mandatory basis.[1339] Such national classification will prove difficult. Due to its indistinctness the Member States have attributed different meaning to the scope rule included in Article 1(2). While the majority has refrained from awarding any significance to the rule, some Member States have ascribed conflict of laws implications to this distinct provision. The latter group of Member States, which include the United Kingdom, Malta and Luxembourg, do not appear to share the prevailing opinion that a transfer of undertaking is to be assimilated under the conflict of laws category for individual contracts of employment. Instead, their national acquired rights provisions include a unilateral conflict of laws provision that seeks connection to the location of the undertaking to be transferred, giving rise to a separate conflict of laws connection for transfers of undertakings.[1340] Consequently, the existing conflict of laws regime for transfers of undertakings is not only ineffective, but plagued by false assumptions, ambiguities and disparities. These problems surrounding the determination of the applicable law for transfers of undertakings appear to be worsened by the different conflict of laws approaches existing throughout the Member States. All these problems and

[1336] *Cf.* Case C-381/98 *Ingmar GB Ltd v Eaton Leonard Technologies Inc* [2000] *ECR* I-09305,
ECLI:EU:C:2000:605.
[1337] See Chapter 4, paragraph 6.
[1338] After all, as is its nature, the directive is not directly applicable to private actors within the Member States. *Cf.* Haanappel van der Burg 2016, p. 8.
[1339] See Article 9(2) Rome I Regulation.
[1340] See Chapter 2, para. 3.

ambiguities highlight the need for a uniform multilateral conflict of laws rule for transfers of undertakings.

*3.3 Seafaring workers*

In 2015, seagoing vessels, which for long were excluded from the scope of the Acquired Rights Directive, entered into the Acquired Rights Directive by way of a revision of Article 1(3).[1341] The underlying aim of this inclusion was to ameliorate the employment of European seafaring workers. Since the high mobility of seagoing vessels might complicate the conflict of laws connection for transfers of undertakings, the present research attributes special meaning to these types of undertakings. Given the highly mobile nature of seagoing vessels it is surprising that the newly inserted Article 1(3)[1342] subjects their transfer to the existing territorial scope, which seeks connection to the geographic location of the undertaking to be transferred. By doing so, it appears that seagoing vessels that constitute a non-land-based undertaking may be captured by the directive whenever they are located within Member State territory or are outwith the directive whenever they are located outside Member State territory; a highly unsettling situation that allows the purposeful evasion of acquired rights provisions by simply venturing outside European waters as well as leaves acquired rights provisions to unintentionally capture transfers of undertakings that are merely passing through Member State waters. It appears that the drafters of Article 1(3) were aware of these possibilities as the provision imposes an additional requirement on the transfer of seagoing vessels demanding the transferee to be situated or the transferred undertaking to remain situated within the territory of an EU Member State. The latter requirement is entirely incompatible with the heightened mobility of seagoing vessels and therefore seems geared towards land-based undertakings involving the

[1341] Directive (EU) 2015/1794 of the European Parliament and of the Council of 6 October 2015 amending Directives 2008/94/EC, 2009/38/EC and 2002/14/EC of the European Parliament and of the Council, and Council Directives 98/59/EC and 2001/23/EC, as regards seafarers, *OJ* [2015] L 263/1.

[1342] This provision reads: 'This Directive shall apply to a transfer of a seagoing vessel that is part of a transfer of an undertaking, business or part of an undertaking or business within the meaning of paragraphs 1 and 2, provided that the transferee is situated, or the transferred undertaking, business, or part of an undertaking or business remains, within the territorial scope of the Treaty. This Directive shall not apply where the object of the transfer consists exclusively of one or more seagoing vessels.' For the reservations I have to the last sentence of this provision see Chapter 5.

transfer of a seagoing vessel as a mere tangible asset. These transfer scenarios however, were already covered by the previous wording of the directive and have now become unwantedly limited to the extent that the directive no longer applies to outbound transfer scenarios, save for the situation where the transferee is located within an EU Member State.[1343]
Although for seagoing vessels that are part of a non-land-based undertaking the location of the transferee has become an additional requirement for application of the directive,[1344] this contingency does not resolve the problems arising from subjecting the transfer of seagoing vessels to the existing territorial scope of the directive. Due to the inherent mobility of seagoing vessels and the concomitant ease with which acquired rights provisions may purposefully be circumvented, the existing territorial scope should not be upheld nor should the geographic location of the undertaking serve as a connecting factor in determining the applicable law.

*3.4 Preferred conflict of laws path*

Since cross-border transfers of undertakings are outside the remit of the Rome I Regulation, and the scope rule of Article 1(2) Acquired Rights Directive does not directly resolve any issues of conflicting laws, there exists a need for determining when national acquired rights provisions are to apply and which national acquired rights provisions are to apply in any given case. Given the inherent one-sided nature of a unilateral conflict of laws connection, any conflict of laws provision for transfers of undertakings is best served with a multilateral connection. A transfer of undertaking, which secures both collective and individual employment interests as well as

[1343] The application of the directive in the event of a transfer of land-based undertakings including *inter alia* the transfer of a seagoing vessel has therefore become limited to intra-European transfer scenario's, save for the situation where the transferee is located within a Member State. I see no reason why the Acquired Rights Directive should be prevented from applying in situations involving the outbound transfer of a seagoing vessel that is part of an undertaking. After all, the entire notion underlying the revision of the directive is to protect those who are employed in the European seafaring industry by securing the continuation of their acquired rights upon a transfer of undertaking. The reasons underlying the repeal of the exclusion of seagoing vessels are additionally based in creating a level playing field for maritime employees and allowing them a position equal to that of on shore employees. By requiring a reliance upon the location of the transferee for situations involving the transfer of seagoing vessels only, the directive fails to meet this aim.

[1344] The insertion of this requirement is striking since the location of the transferee or the transferred undertaking after the transfer is of no relevance for the transfer of land-based undertaking; See Chapter 5.

inhabits certain internal market considerations, is to be subjected, as a whole, to a single legal system. The issue of transfers of undertakings to my mind should consitute an independent reference category under the conflict of laws. In determining the law that applies to a transfer of undertaking connection should be sought to the location of the undertaking (to be transferred) as this embodies the most natural connecting factor.[1345] A connection to the seat of this undertaking signifies the application of a neutral conflict of laws connection that is closely connected to the pivot of the Acquired Rights Directive, i.e. the undertaking to be transferred.[1346] A choice for this connecting factor is supported by the wording of the Acquired Rights Directive, which in Article 1(2) attributes special meaning to the seat of the undertaking by causing the directive to apply 'where and in so far as the undertaking, business or part of the undertaking or business to be transferred *is situated* within the territorial scope of the Treaty'.[1347] A connection to the location of the undertaking to be transferred additionally prevents a fragmentation of laws, by subjecting the entire workforce to the same national acquired rights provisions, thus preventing that only part of the workforce is transferred to the transferee.[1348]

The effects of a transfer of undertaking are not limited to the individual employment relationship, but extend to operational, economic and collective employment interests. A connection to the individual contract of employment therefore forms an unbecoming connecting factor,[1349] as it ignores the aim and purpose of the directive and may require a lengthy assessment of the applicable law.[1350] By comparison, the seat of the

[1345] *Cf.* Bittner 2000, p. 464 et seq; Junker 1992, p. 234 *et seq*.; Junker 1994, p. 40; Birk 1982, p. 396; Reichold 2008, p. 697 et seq; Birk 1978, p. 291-29; Henckel 2012, p, 389; Haanappel-van der Burg 2015, p. 293; Haanappel-van der Burg 2016 I, p. 8; *Cf.* Laagland 2011, p. 17; Junker 2012, p. 13.

[1346] Niksova 2014, p. 72; Junker 1992, p. 235.

[1347] Emphasis added KCH.

[1348] Niksova 2014, p. 72; Bittner 2000, p. 464. In this, the law that governs the individual employment contract of the affected employees (which may be a cause for a fragmentation of laws) is immaterial.

[1349] Bittner 2000, p. 464; Birk 1982, p. 396; I.A. Haanappel-van der Burg 2015, p. 290.

[1350] See Chapter 5, paragraph 5; paragraph 8; *Cf.* Article 8 Rome I Regulation. Such a lengthy assessment will mostly take place where it concerns undertakings with a high level of mobility or an undertaking that carries out activities in several countries including the one in which it is situated. These type of undertakings may embody a larger number of cross-border transfers when compared to undertakings that that are solely conducting their business within

undertaking to be transferred is easily located. Still, the law that applies to the employment contract and the law of the location of the undertaking to be transferred as possible connecting factors for the transfer of undertaking will generally provide similar results.[1351] After all, the seat of the undertaking to be transferred is likely to coincide with the habitual place of employment.[1352] The primary advantages of the proposed connecting factor and main reasons for renouncing the connection to the individual contract of employment lie in the exclusion of a choice of law and the avoidance of a *conflit mobile*[1353].

*3.4.1 Choice of law*

Even though party autonomy constitutes a cornerstone of modern day private international law it is entirely incompatible with the issue of transfers of undertakings.[1354] The predominant aim of a transfer of undertaking, which is not primarily a contractual issue since it occurs by operation of law, is to

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one single country. Still, in most cases the employees of the undertaking to be transferred will habitually carry out their employment at the location of the undertaking to be transferred, allowing no difference between the application of the law that applies to the individual contract of employment and the laws in force at the seat of the undertaking to be transferred. See Chapter 5, paragraph 5; paragraph 8.

[1351] Where there does exist a difference in the law governing the employment contract and the law governing the transfer of undertaking such difference does not pose any problems. After all, the transfer of undertaking is an area of law that can be separated as a whole from the general body of employment law. As such there exists no overlap and therefore no conflict between the rules of employment law covered by the choice of law in the employment contract and the rights and obligations stemming from a transfer of undertaking.

[1352] Junker 2012, p. 13.

[1353] A strict connection to the individual employment contract results in a possible change in the applicable law since Article 8 Rome I Regulation does not impose a temporal fixation on the applicable law. Surely, in applying the conflict of laws rules for individual employment contracts to transfers of undertakings one could impose such a temporal fixtation, however, this is not possible within the existing Rome I Regulation. Such temporal fixation would therefore require a separate conflict of laws rule or application for transfers of undertakings. (*Cf.* Niksova 2014, p. 89; Deinert 2013, p. 341; Junker 2005, p. 735)

[1354] This view is aided by a decision of the EFTA court in which it held that: 'the purpose of the Directive is to ensure that the rights arising from a contract of employment or employment relationship of employees affected by the transfer of an undertaking are safeguarded. Since this protection is a matter of public policy, and therefore independent of the will of the parties to the contract of employment, the rules of the Directive must be considered to be mandatory, so that it is not possible to derogate from them in a manner unfavourable to employees. It follows that employees are not entitled to waive the rights conferred on them by the Directive and that those rights cannot be restricted even with their consent.' (Case E3/95 *Torgeir Langeland v Norske Fabricom A/S* [1995-1996] *EFTA Ct. Rep.* 36, para. 42-43)

secure the transfer (and continuance) of the acquired rights of the employees affected by the transfer. It should not be possible to negate this employee-protective aim by reason of a choice of law. Since the allowance of a *professio iuris* bears the risk that the employees will be deprived of the protection afforded to them by the Acquired Rights Directive the conflict of laws reference in matters relating to a cross-border transfer of undertaking should not inhabit the possibility of such a choice of law.[1355] Transferee and transferor should not be able to bypass the provisions stemming from the Acquired Rights Directive by a 'unilateral' choice of law decision outside the influence of the affected employees.[1356] Any conflict of laws regime for transfers of undertakings should therefore exclude party autonomy.[1357]

*3.4.2 Temporal fixation*

In establishing a conflict rule determining the applicable law to any legal relationship the conflict of laws connection generally consists of three elements: a subject (transfer of undertakings), an attribute of this subject (location of the undertaking to be transferred) and a time of determination.[1358] In seeking connection to the seat of the undertaking to be transferred this time of determination should equate to the time of the transfer. As such, the applicable law should be fixed to the location of the undertaking upon or immediately prior to the transfer. In determining the applicable law to a transfer of undertaking, the time or date of the transfer is a factor of great significance as this is the time at which the existing employment relationships will transfer to the transferee.[1359] This transfer is

[1355] *Cf.* Gamillscheg 1959, p. 237; Gamillscheg 1983, p. 359; Junker 1992, p. 233; Kronke 1981, p. 159; Kronke 1989, p. 9; Mankowski 1994, p. 96; Kania 2012, p. 82-83, Franzen 1994, p. 70; Däubler 1994, p. 124; Niksova 2014, p. 70-71; Bittner 2000, p. 460, footnote 20; Richter 1992, p. 70; Drobnig, Becker & Remien, 1991, p. 68.

[1356] Niksova 2014, p. 71; Kania 2012, p. 83; Däubler 1994, p. 124.

[1357] This is an advantage over the connection to the individual employment contract, which allows the parties to subject their contract to a choice of law (subject to some limitations).

[1358] See e.g. Kropholler 1990, p. 115.

[1359] Another argument against the change in applicable law may be found in the similarity to the conflict of laws assessment of contract acquisition or the assignment of debts, which is utilized as a justification for the assimilation of transfers of undertakings under the conflict of laws category of employment contracts. Under the conflict of laws assessment of contract acquisition the transfer of a contract is governed by the law that governs the contract itself. This law continues to be decisive after the transfer.

not subject to continuity as it occurs *ope legis* at a set moment in time.[1360] A failure to impose a temporal fixation on the determination of the preferred connecting factor would result in the occurrence of an needless *conflit mobile* upon the relocation of the transferred undertaking. Allowing such a *conflit mobile* or change in the law that governs a transfer of undertaking does not do justice to a transfer of undertaking, which occurs at a distinct moment in time. More so, allowing a change in the applicable law to a transfer of undertaking obviously conflicts with the aim of the Acquired Rights Directive, which is to protect the rights of workers employed in European-based undertakings regardless of the destination of those undertakings upon or after the transfer. A failure to impose a temporal fixation upon the conflict of laws connection would result a transfer only having some effect if the laws at the original location and the new location of the transferred undertaking allow for an automatic transfer of the employment relationship and the rights and obligations stemming therefrom. Such a concurrence of laws is at odds with Article 1(2) Acquired Rights Directive, which merely requires the undertaking *to be transferred* to be located within an EU Member State prior to the transfer, thus providing no significance to the country of destination. Setting such a requirement would needlessly thwart the application of the Acquired Rights Directive, which applies to intra-European and outbound transfers alike.

In situations involving a transfer of undertaking that is accompanied by a cross-border relocation a swift integration into the legal system of the state of relocation is surely desired.[1361] Such integration should not be ensured through allowing a *conflit mobile* for transfers of undertakings. Instead integration into the legal system of the state of relocation may come to pass by a change in the law that applies to the individual employment contract. Due to a change in the objective connecting factor of the habitual place of employment the applicable law to an individual employment contract is likely to change upon the relocation of the transferred undertaking, which is consistent with the enduring nature of the employment relationship. By contrast, allowing a change in the law that governs (the effects of) a transfer of undertaking would unwantedly limit the application of the Acquired

[1360] It this context it should be noted that the rights and obligations stemming from a transfer of undertaking, although occurring by operation of law at a set moment in time may have a continuing effect on the existing employment relationship. In this sense the employment relationship, which is subject to continuity, differs from a transfer of undertaking.
[1361] *Cf.* Haanappel-van der Burg 2016 I, p. 9; Haanappel-van der Burg 2015, p. 295-296.

Rights Directive as well as defeat its aim and purpose.[1362] Consequently, it is imperative that the conflict of laws allows the full application of the Acquired Rights Directive and its national counterparts. Once the conflict of laws norm imposes a temporal fixation on the (determination of the) conflict of laws connection a *conflit mobile* is averted and the applicable law becomes immutable.[1363]

*3.4.3 Overriding effect of provisions exceeding minimum protection*

The Acquired Rights Directive only effectuates minimum harmonisation, leaving the Member States free to utilize national law to exceed the protection awarded the directive.[1364] A Member State may extend the scope of its acquired rights provisions and the level of protection offered to the employees affected by the transfer. In addition, Member States may choose to utilize one or more of the options provided by the directive by extending the application of national acquired rights legislation to e.g. insolvent undertakings or supplementary old-age, invalidity or survivor's benefits. Since the directive only ensures a minimum level of employment protection the national acquired rights provisions of the Member States are placed on equal footing insofar as it concerns this minimum level of harmonisation. However, Member State provisions that exceed the level of protection secured by the directive may enjoy overriding mandatory effect in relation to other Member States[1365] If the application of national acquired rights provisions of exceeding protection is considered essential according to the general structure and circumstances under which the law was adopted[1366] these provisions could have an overriding effect on the *lex causae.* Since transfers of undertakings are beyond the remit of the Rome I Regulation, the application of foreign overriding mandatory provisions is not limited by European legislation.[1367] As a result, it is left to the Member States, to

[1362] In outbound transfer scenario's allowing a *conflit mobile* would limit the application of the Acquired Rights Directive, which clearly extends to these types of transfers. Due to the existence of a conflit mobile however, the transfer of the acquired rights of employees involved in an outbound transfer, upon relocation, becomes dependent upon the laws of the country of relocation, which is at odds with the Acquired Rights Directive.

[1363] Looschelders 2004, p. 35; Rauscher 2009, p. 106-107; Henrich 2010, p .289.

[1364] See Article 8 Acquired Rights Directive.

[1365] *Cf.* Case C-184/12 *Unamar* [2013] ECLI:EU:C:2013:663.

[1366] *Cf.* Case C-184/12 *Unamar* [2013] ECLI:EU:C:2013:663., para. 50.

[1367] Article 9(3) Rome I Regulation severely limits the application of the overriding mandatory provisions of any state other than the *lex fori.*

determine on the basis of their own private international law, whether and to what extent such provisions are to be reckoned with.

*3.4.4 Preferred connecting factor for seagoing vessels*

The preferred connecting factor for transfers of undertakings is the location of the undertaking to be transferred. This undertaking, as pivot of the Acquired Rights Directive, embodies the most natural connection. For seagoing vessels that are part of a non-land-based undertaking, such a connection, however, does not yield a satisfactory result. A connection to the location of the vessel to be transferred would invite abusive tactics on the part of ship owners seeking to evade the application of the directive in addition to allowing vessels to accidentally be captured by the directive. As such, the inherent mobility of seagoing vessels and the ease with which acquired rights provisions may be avoided call for a different connecting factor for seagoing vessels. In seeking a connecting factor for seagoing vessels, a connection to the flag state should be rejected in favour of a connecting factor that ensures a genuine connection to a particular state. Given the ease of flagging out and the risk of abusive reflagging tactics the flag does not form a suitable connection for transfers of undertakings. It is therefore preferred to seek connection to the state from where the seagoing vessel (that is part of an undertaking) to be transferred is operated and controlled.[1368] Whilst navigating the high seas as a *locus sine lege* the state from which the vessel is actually operated and controlled forms the one true continuous connection to any particular state. Moreover, this connecting factor fits in well with the directive, which applies whenever there is a change in the natural or legal person *responsible for carrying on the business*.[1369]

## 4. Recommendations

The purpose of the present research is to establish the necessity, desirability and (possible) shaping of private international law provisions, in the areas of jurisdiction and the conflict of laws, for (cross-border) transfers of undertakings. A critical evaluation of the existing private international law instruments has shown that this regime does not fully accommodate issues arising from cross-border transfers of undertakings. More so, existing views

[1368] *Cf.* Henckel 2012.

[1369] *Cf.* Case 287/86 *Ny Mølle Kro* [1987] ECR 5465, ECLI:EU:C:1987:573 para. 12; Joined Cases C-232/04 and C-233/04 *Securicor* [2005] *ECR* I-11237, ECLI:EU:C:2005:778, para. 31.

and theories do not provide an entirely satisfactory solution to any of the problems within the realm of private international law. As a result, the present research deems it necessary and desirable to alter the existing private international law regime for transfers of undertakings by suggesting the inclusion of private international law provisions within the Acquired Rights Directive. The inclusion of such provisions would serve a dual aim: first it would resolve the existing problems of private international law, and second, it would clearly and unequivocally establish that cross-border transfers of undertakings are within the ambit of the Acquired Rights Directive.

*4.1 Jurisdiction*

In the area of jurisdiction, a subject that is sparsely discussed in relation to transfers of undertakings, the Brussels I Recast does not provide a separate jurisdictional category for transfers of undertakings. Instead, the rights and obligations arising from a transfer of undertaking are accommodated under the existing Articles of the regulation. Although transfers of undertakings are within the remit of the regulation, the classification of these rights and obligations as belonging to a specific jurisdictional rule may at times constitute a difficult task. In addition, in situations where the affected employees, employees representatives and trade unions would have to rely on the *forum rei*, there may not be sufficient proximity between the competent court and the transfer-related dispute. Moreover, in outbound transfer scenarios where the transferee is not domiciled within a Member State, the Brussels I Recast does not provide a ground for jurisdiction despite the existence of a genuine connection to Member State territory. In light of these issues the present research proposes an additional ground for jurisdiction. Since the Brussels regime generally provides sufficient access to justice, save for e.g. situations where it involves a non-Member State transferee, a separate jurisdictional category for transfers of undertakings is not proposed. The introduction of such a separate category would conflict with the employee-protective nature of the Acquired Rights Directive by depriving the employees of the multiplicity of jurisdictional bases offered under the regulation. Instead, the Acquired Rights Directive should, akin to the Posting of Workers Directive,[1370] include a rule on jurisdiction additional

[1370] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services *OJ* [1997] L18/1, which in Article 6 provides a specific provision on jurisdiction; *Cf.* the upcoming revision of the Posting of Workers Directive: Proposal for a Directive of the European Parliament and of the Council amending Directive 96/71/EC of The European Parliament and

to those existing within the Brussels regime. I therefore recommend the inclusion of a single rule on jurisdiction for all rights and obligations arising from a transfer of undertaking. Such a rule should, in light of procedural efficiency and proximity, designate the courts of the Member State in which the undertaking to be transferred is situated upon or immediately prior to the transfer.

*4.2 Conflict of laws*

The area of the conflict of laws in relation to transfers of undertakings is plagued by false assumptions, ambiguities and disparities. Not only do there exist a variety of views on the appropriate conflict of laws path, the laws and approaches of the Member States vary in this regard. Whereas most Member States seek connection to the individual contract of employment, some abide by a unilateral conflict of laws provision requiring application whenever the undertaking to be transferred is situated within the territory of the Member State concerned. Both of these approaches possess obvious flaws. Under the connection to the individual employment contract, application is often sought of the Rome I Regulation. This regulation however, does not cover transfers of undertakings, as these occur by operation of law rather than being the result of contractual negotiations. More so, the connection to the individual employment contract is ill-suited to deal with issues of transfers of undertakings. Not only does it neglect the operational, economic and collective interests of the regulation, it also allows party autonomy and is considered to give rise to a *conflit mobile*, both of which are incompatible with a transfer of undertaking. As a result, a connection to the individual employment contract fails to do justice to the nature and purpose of the Acquired Rights Directive.

To my mind, transfers of undertakings should constitute a separate conflict of laws category for which connection is to be sought to the nexus of the transfer: the (location of) undertaking to be transferred. This conflict of laws reference should point towards the law that governs (the effects of) a transfer of undertaking rather than determine the territorial scope of national acquired rights provisions akin to the approach utilized by Luxembourg, the United Kingdom and Malta. At a European level, in intra-European transfer scenarios, there is no need for a unilateral approach to the conflict of

of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services COM(2016) 128 final.

laws.[1371] After all, the Member States, by reason of their implementation of the minimum protection secured by the Acquired Rights Directive, share certain rights and values on the preservation of acquired rights. Even though such rights and values may not be shared with non-Member States, the aim of the Acquired Rights Directive does not allow for a different conflict of laws approach in their regard.[1372] The notion underlying the directive that all those employed in European based undertakings require a continuance of their acquired rights upon the transfer of the undertaking in which they are employed should be guaranteed.[1373] The location of the transferred undertaking after relocation should therefore play no part in the conflict of laws equation. Consequently, I recommend the inclusion of a conflict of laws provision into the Acquired Rights Directive, thus securing the creation of a separate conflict of laws category for (all rights and obligations stemming from) transfers of undertakings. This conflict of laws provision should designate the applicable law in intra-European and outbound transfer scenarios alike by designating the laws of the country of the location of the undertaking to be transferred.

*4.3 Seagoing vessels*

With the inclusion of seagoing vessels into the Acquired Rights Directive, these types of undertakings have become subject to the provisions contained therein. Any conflict of laws provision included into the directive would therefore extend to seagoing vessels that are part of an undertaking. Where these vessels are part of a land-based undertaking the connection to the location of the undertaking does not pose a problem. However the proposed conflict of laws connection for land-based undertakings is incompatible with the highly mobile nature of seagoing vessels where seagoing vessels are part of a non-land-based undertaking.[1374] For these types of transfers, a connection to the location of the undertaking would invite abusive evasion tactics. Seagoing vessels therefore require a different connecting factor. Given the ease of flagging out a connection to the flag state should not be preferred. Instead a connection to the state from where the seagoing vessel

[1371] *Cf.* Ten Wolde 2011.

[1372] See Chapter 4, para. 8.

[1373] Since the employees cannot exert any influence on the change in their employer they require a protection of their interests and the rights and obligations stemming from their employment contract. In this, the location of the undertaking after (completion of) the transfer should remain immaterial.

[1374] E.g. where the vessel, cargo contracts and client base are transferred to the transferee.

(that is part of an undertaking) to be transferred is operated and controlled as the one true continuous connection to any particular state should be preferred. Such a connection, however, does not solve all problems arising in relation to the transfer of seagoing vessels. Under the existing directive the transfer of seagoing vessels is subject to the directive's existing territorial scope, making the application of the directive contingent upon the location of the undertaking to be transferred. Given the heightened mobility of seagoing vessels and the risk of purposeful evasion tactics the existing territorial scope should not be upheld. More so, the additional requirements conflict with the nature and aim of the Acquired Rights Directive and fail to create a level playing field for maritime employees, thus defeating the aim of the revision of the directive. I therefore recommend a revision of the existing Article 1(3) of the Acquired Rights Directive comprising of the introduction of a different territorial scope for seagoing vessels and a repeal of the requirements demanding the transferee to be situated or the transferred undertaking to remain situated within a Member State. With regard to seagoing vessels that are part of non-land-based undertaking the territorial scope of the directive should be amended to the extent that the directive applies insofar as the seagoing vessel to be transferred is operated and controlled from a Member State, i.e. a location within the territorial scope of the Treaty. Where it concerns the conflict of laws I recommend that the directive includes a separate conflict of laws provision for the transfer of seagoing vessels. This conflict of laws provision should designate the law of the country from where the undertaking (seagoing vessel) is actually operated and controlled.

*4.4 Final recommendations*

In conclusion, I recommend the inclusion of private international law provisions in a new Chapter IV[1375] of the Acquired Rights Directive, which could be entitled 'jurisdiction and applicable law' and could be shaped as follows:

> **Jurisdiction**
>
> In order to enforce the rights and obligations stemming from this directive, proceedings may be instituted in the Member State in which the undertaking to be transferred is situated upon or immediately prior to the transfer without prejudice, where

[1375] In such a case the final provisions of the directive would move to a new Chapter V.

applicable, to the right, under existing international conventions and regulations on jurisdiction, to institute proceedings in another State.

**Applicable law**

1. A transfer of undertaking shall be governed, without prejudice to paragraph 2, by the law of the Member State in which the undertaking to be transferred is situated upon or immediately prior to the transfer.

2. A transfer of a seagoing vessel that constitutes a transfer of an undertaking, business or part of an undertaking or business shall be governed by the law of the Member State from which the undertaking to be transferred is actually operated and controlled upon or immediately prior to the transfer.

# Summary

Continued globalisation and market integration have shaped the current economic climate in such a way that it facilitates and has facilitated an increase in cross-border mergers, acquisitions and corporate restructurings. In coming years, corporate mobility is likely to carry on to increase. The employment effects of such cross-border corporate mobility lie at the heart of the present book. In light of the existing and expected rise in corporate mobility, the employment effects of cross-border corporate mobility, where it concerns cross-border mergers, acquisitions and corporate restructurings, are issues of substantial practical relevance. Throughout the European Union, the Acquired Rights Directive provides for the safeguarding of employees rights in the event of a change in employer as a result of a legal transfer or merger. It is this directive that forms the object of this book. The Acquired Rights Directive, through e.g. the automatic transfer of rights and obligations stemming from the employment contract to the new employer seeks to ensure that employees do not forfeit essential rights acquired prior to a change in employer. The directive, which applies throughout the Member States of the European Union, only aims to provide partial and minimum harmonization, resulting in an inevitable divergence of the laws of these Member States. As an inescapable result of partial and minimum harmonization, the laws of the Member States naturally differ, resulting in issues of conflicting laws in the event of a cross-border transfer of undertaking. Any cross-border transfer of undertaking may therefore give rise to issues of conflicting laws and other questions of a private international law nature. This book primarily deals with cross-border transfers of undertakings that are coupled with the cross-border relocation of such undertakings. In cross-border transfer scenarios, it is essential to establish which national acquired rights provisions are to prevail in situations involving a conflict between the acquired rights laws of the countries connected to such a transfer, e.g. the acquired rights provisions existing in the country of origin, at the location of the undertaking to be transferred, and in the country of relocation. Since, the place of adjudication is key in determining the applicable law, an additional question of importance is which courts are competent to adjudicate a transfer-related dispute. Building on these questions, the main purpose of this book is to

establish the necessity, desirability and (possible) shaping of private international law provisions for (cross-border) transfers of undertakings.

The book, which consists of six separate Chapters, in its first Chapter, outlines the research aims and methodology and contains a preliminary introduction into the general subject matter of the book. In essence, the present research makes use of an eclectic research method, combining several approaches to legal research, such as e.g. a comparative, legal historical and black letter approach. This research methodology is utilized in fulfilling the three primary aims of the book. The present research:

1. Seeks to analyse the existing rules on international jurisdiction and the conflict of laws relating to (cross-border) transfers of undertakings and their deficiencies;
2. Seeks to outline and critically evaluate the views on overcoming these dificiencies and their merits and demerits;
3. Intends to suggest the most appropriate and desired private international law path, possibly by offering suggestions for the shaping of coherent legislative rules on private international law in relation to cross-border transfers of undertakings.

The second Chapter starts to fulfill these aims by providing an overview of the substantive effects of a transfer of undertaking. In essence, this Chapter deals with the larger substantive issues that may arise in situations involving a cross-border transfer of undertaking. In addition, Chapter 2 addresses the definition of a cross-border transfer of undertaking. Several types of cross-border transfer scenarios can be distinguished. In essence, any cross-border transfer of undertaking requires some foreign element, which may either lie in the person of the transferee or the location of the undertaking upon or after the transfer. Throughout this book however, cross-border transfers of undertakings are characterized as transfers of undertakings involving a cross-border relocation of the transferred undertaking. To this end, three types of transfer scenarios are identified: the intra-European transfer, the outbound transfer and the inbound transfer. Since the Acquired Rights Directive, by reason of its Article 1(2), only applies only to intra-European and outbound transfer scenarios, they hold the emphasis of the present research.

Since the application of the directive is primarily contingent upon the transfer of a stable economic entity that retains its identity the question of whether an undertaking involved in a cross-border transfer is able to retain such identity is one of critical importance. Transfers of undertakings that are coupled with a cross-border relocation will generally result in the affected employees becoming subject to a different social, economic and legal environment. Such a change however, does not *per se* prevent a transfer of undertaking from taking effect. In cross-border transfer scenarios, the question of whether a transfer has occurred is to be assessed on the basis of the same factors that apply to domestic transfer situations: the retention of identity-test applies to domestic and cross-border transfer scenarios alike. Under this seven-headed test, established by the ECJ in its seminal judgment in the case of *Spijkers,* it has to be determined whether the business or undertaking was transferred as a going concern and has retained its identity after the transfer. A relocation to a different social, economic and legal environment does not affect the application of this test. A 'change in environment-test' is uneasily reconciled with the strictly applied *Spijkers*-factors. Once the *Spijkers*-factors are fulfilled, there is a transfer of a going concern and the transferred undertaking retains its identity. When a transfer of undertaking by legal transfer or merger and a retention of identity have been established, the Acquired Rights Directive and its national counterparts will take effect, provided that the territorial and personal scope of the directive are additionally satisfied.

As an instrument of partial and minimum harmonization, the directive is not directly applicable to individual actors within the Member States, instead, it are national acquired rights provisions that apply to any given case. Chapter 2 of this book signals that these national provisions differ in certain key areas, e.g. where it concerns the definition of employee, the effects awarded to the employees' objection to transfer, the observance of terms and conditions existing in collective agreements, the observance of supplementary pension schemes and the application of national acquired rights provisions to insolvent undertakings. As a result, in cross-border transfer scenarios, issues of conflicting laws are likely to arise. It therefore needs to be clearly established which law applies to a transfer of undertaking.

When cross-border transfers of undertakings give rise to disputes the issue of international jurisdiction inevitably arises. In these cross-border transfer scenarios it is vital to establish the court that has international jurisdiction. This issue is addressed in Chapter 3 of this book. The aim of this Chapter is twofold: first, it seeks to outline the rules on jurisdiction pertaining to cross-border transfers of undertakings existing in the EU Member States and second, it intends to assess whether these rules on jurisdiction are in need of revision.

Since the Acquired Rights Directive itself does not contain any provisions on international jurisdiction this issue, throughout the EU Member States, is to be resolved on the basis of the Brussels I Recast. This regulation does not offer a special jurisdictional category for transfers of undertakings. Instead, the claims arising from a cross-border transfer are divided among several Articles on jurisdiction existing in the regulation. Although the classification of transfer-related claims may prove difficult, these Articles on jurisdiction generally offer sufficient access to justice. However, in some cases the Brussels regime does not offer a satisfactory result in light of procedural efficiency and the objectives of the Acquired Rights Directive. Under application of the Brussels I Recast, claims arising from the transfer of an undertaking established in the European Union may be outside the scope of the regulation despite the existence of a sufficiently close connection between the dispute and the courts of a European Member State. For these situations, Chapter 3 argues for an additional ground of jurisdiction to be included into the Acquired Rights Directive. This additional ground of jurisdiction, which provides jurisdiction to courts of the seat of the undertaking to be transferred, should serve as a single (additional) jurisdictional basis for all claims seeking to enforce rights and obligations stemming from a transfer of undertaking.

Chapter 4 forms the heart of this book and concerns the issue of the conflict of laws. This fourth Chapter seeks to assess and define the rules that determine the applicable law in the event of a cross-border transfer of undertaking. In doing so, the Chapter critically evaluates the large variety of views and ideas on the method through which the law applicable to a transfer of undertakings is and should be obtained. One of the most important findings of this Chapter is that the Member States deal with the issue of the conflict of laws in different ways. A plea is therefore made for the introduction of a new and uniform multilateral conflict of laws provision for

transfers of undertakings. In establishing the proper conflict of laws connection for this new conflict of laws provision a connection to the employment contract and the transfer agreement are rejected in favour of a connection to the undertaking to be transferred. The choice for the latter connecting factor lies in the fact that this factor embodies the most natural connecting factor for transfers of undertakings. A connection to the seat of the undertaking signifies the application of a neutral conflict of laws connection that is closely connected to the pivot of the Acquired Rights Directive, i.e. the undertaking to be transferred. Additional support for the use of this connecting factor may be found in Article 1(2) Acquired Rights Directive which causes the directive to apply 'where and in so far as the undertaking, business or part of the undertaking or business to be transferred *is situated* within the territorial scope of the Treaty'. As such, the Chapter establishes the preferred method through which the law applicable to a cross-border transfer of undertaking is to be determined. The proposed conflict of laws connection should be fixated in time in order to prevent a *conflit mobile* and should, in light of the mandatory and employee protective nature of the Acquired Rights Directive, exclude the option of a choice of law.

Chapter 5 addresses the recent inclusion of seagoing vessels into the Acquired Rights Directive and the effects of this inclusion upon the conflict of laws. The primary purpose of Chapter 5 is to assess whether the special characteristics of the maritime sector, i.e. its inherent cross-border and international features, give rise to a special conflict of laws consideration for seagoing vessels in relation to transfers of undertakings. Where seagoing vessels are part of a land-based undertaking the connection to the location of the undertaking does not pose a problem. However, the proposed conflict of laws connection for land-based undertakings does not fit in well with the highly mobile nature of seagoing vessels that are part of a non-land-based undertaking. Where it concerns the transfer of these types of undertakings, a connection to the location of the undertaking would invite abusive evasion tactics. As such, Chapter 5 proposes a different connecting factor for seaoing vessels. Giving the ease of flagging out the flag state is rejected as a possible connecting factor. Instead, Chapter 5 advocates a connection to the state from where the seagoing vessel (that is part of an undertaking) to be transferred is operated and controlled as this location embodies one true continuous connection to any particular state.

The final Chapter concludes the book by outlining the preferred private international law path for transfers of undertakings and by offering recommendations and suggestions for private international law provisions to be included into the Acquired Rights Directive. In essence the Chapter provides the final, most important recommendation in the form of a suggestion for the amendment of the Acquired Rights Directive. This recommendation suggests the inclusion of private international provisions concerning jurisdiction and the conflict of laws into the Acquired Rights Directive.

# Samenvatting

Voortschrijdende globalisering en marktintegratie hebben het huidige economische klimaat zodanig gevormd dat dit klimaat een toename van grensoverschrijdende fusies, overnames en herstructureringen faciliteert. In de komende jaren zal de ondernemingsmobiliteit waarschijnlijk verder stijgen. De arbeidsrechtelijke gevolgen van dergelijke grensoverschrijdende ondernemingsmobiliteit staan centraal in dit boek. In het licht van de huidige en verwachte stijging in ondernemingsmobiliteit, in het bijzonder waar het grensoverschrijdende fusies, overnames en herstructureringen betreft, zijn de arbeidsrechtelijke gevolgen van dergelijke mobiliteit van aanmerkelijke praktische relevantie. Binnen de Europese Unie zorgt de richtlijn overgang van onderneming voor het behoud van rechten van werknemers in het geval van een wijziging in werkgever tengevolge van een overdracht krachtens overeenkomst of fusie. Deze richtlijn vormt het primaire onderwerp van dit boek. Door bijvoorbeeld de automatische overgang van de rechten en verplichtingen uit de arbeidsovereenkomst zorgt de richtlijn overgang van onderneming ervoor dat werknemers essentiële rechten die voorafgaand aan de wijziging in werkgever zijn verkregen niet verliezen. De richtlijn, die van toepassing is in de lidstaten van de Europese Unie, beoogt slechts gedeeltelijke en minimum harmonisatie, hetgeen resulteert in onvermijdelijke verschillen in de wetgeving van de lidstaten. Dergelijke verschillen in wetgeving leiden in geval van een grensoverschrijdende overgang van onderneming onontkoombaar tot vragen van internationaal privaatrecht. Elke grensoverschrijdende overgang van onderneming kan aanleiding geven tot vragen betreffende het toepasselijk recht en tot andere vragen van internationaal privaatrechtelijke aard. Dit boek betreft in de eerste plaats de grensoverschrijdende overgang van onderneming die gepaard gaat met de grensoverschrijdende relocatie van desbetreffende onderneming. In grensoverschrijdende gevallen is het van belang om vast te stellen welke nationale bepalingen betreffende de overgang van onderneming van toepassing zijn, in het bijzonder wanneer er verschil bestaat tussen het recht van bijvoorbeeld het land van herkomst, zijnde de vestigingsplaats van de overgaande onderneming en het land van

bestemming. Aangezien de plaats van berechting een sleutelrol vervult bij het bepalen van het toepasselijk recht is het aanvullend van belang om vast te stellen welke rechters bevoegd zijn om van een aan de grensoverschrijdende overgang van onderneming gerelateerd geschil kennis te nemen. Het belangrijkste doel van dit boek is om de noorzaak, wenselijkheid en mogelijke vormgeving van bepalingen betreffende het internationaal privaatrecht met betrekking tot de overgang van onderneming te onderzoeken.

Het boek, dat bestaat uit zes afzonderlijke hoofdstukken, schetst in het eerste hoofdstuk de doelstellingen van het onderzoek en de gebruikte methodologie. Daarnaast bevat het een eerste algemene inleiding in het onderzoeksonderwerp. In het onderzoek is gebruik gemaakt van een eclectische onderzoeksmethode, welke verschillende methoden van juridisch onderzoek combineert, zoals bijvoorbeeld de rechtsvergelijkende, historische en traditionele methode. Deze onderzoeksmethode wordt gebruikt om de drie primaire doelstellingen van dit onderzoek te vervullen:

1. Het onderzoek poogt bestaande regels van internationaal privaatrecht, op het terrein van het internationale bevoegdheidsrecht en het conflictenrecht, met betrekking tot de grensoverschrijdende overgang van onderneming en hun tekortkomingen te analyseren;
2. Het onderzoek tracht de verschillende visies op het overwinnen van deze tekortkomingen in kaart te brengen en de voor- en nadelen daarvan te evalueren;
3. Het onderzoek is voornemens de meest geschikte en gewenste internationaal privaatrechtelijke oplossing te wijzen, mogelijk door suggesties voor de vormgeving van samenhangende regels van internationaal privaatrecht met betrekking tot de grensoverschrijdende overgang van onderneming op te werpen.

Het tweede hoofdstuk begint deze doelstellingen te vervullen door inzicht te geven in de materieelrechtelijke gevolgen van een overgang van onderneming. Dit hoofdstuk behelst in hoofdzaak de grotere materieelrechtelijke kwesties die rijzen in het kader van een grensoverschrijdende overgang van onderneming. Daarnaast verstrekt het hoofdstuk een definitie van de term grensoverschrijdende overgang van

onderneming. In dit kader worden verschillende grensoverschrijdende scenario's onderscheiden. In de kern vereist iedere grensoverschrijdende overgang van onderneming enig internationaal element. Dit internationale element kan gelegen zijn in de persoon van de verkrijger of the locatie van de onderneming na de overgang. In dit boek wordt de grensoverschrijdende overgang van onderneming echter gekenmerkt als een overgang van onderneming die gepaard gaat met een grensoverschrijdende relocatie. Hiertoe worden drie categorieën onderscheiden: de intra-Europese overgang van onderneming; de uitgaande overgang van onderneming en de inkomende overgang van onderneming. Doordat de richtlijn overgang van onderneming, op basis van art. 1(2), enkel betrekking heeft op intra-Europese en uitgaande overgangen van onderneming(en) wordt daarop in het huidige onderzoek de nadruk gelegd.

Aangezien de toepassing van de richtlijn overgang van onderneming in de eerste plaats afhankelijk is van de overdracht van een economische eenheid die haar identiteit behoudt is de vraag naar identiteitsbehoud in het kader van de grensoverschrijdende overgang van onderneming van bijzonder belang. De overgang van onderneming die gepaard gaat met een grensoverschrijdende relocatie zal voor de getroffen werknemers, zo zij al bereid zijn om hun arbeid in het buitenland voort te zetten, in het algemeen resulteren in wijziging van hun sociale, juridische en economische omgeving. Een dergelijke wijziging voorkomt echter niet noodzakelijkerwijs dat een overgang van onderneming plaatsvindt. In grensoverschrijdende situaties dient de vraag of een overgang van onderneming heeft plaatsgevonden te worden beantwoord aan de hand van dezelfde criteria als die welke gelden in het kader van een nationale overgang van onderneming: de test naar identeitsbehoud geldt zowel voor de nationale als voor grensoverschrijdende overgang van onderneming. Op basis van deze zevenkoppige test, die door het Hof van Justitie is vastgesteld in zijn arrest in de zaak *Spijkers*, dient te worden vastgesteld of er sprake is van de vervreemding van een lopend bedrijf dat zijn identiteit behoudt. Een relocatie naar een andere sociale, economische en jurisdische omgeving heeft geen invloed op de toepassing van deze test. Een 'wijziging in omgevingstest' is niet te verzoenen met de strikte toepassing van de *Spijkers*-factoren. Zodra aan de *Spijkers*-factoren is voldaan, is er sprake van de overgang van een lopend bedrijf en behoudt de overgaande onderneming

haar identiteit. Wanneer het de overgang van onderneming ten gevolge van een overdracht krachtens overeenkomst of een fusie betreft en er sprake is van identiteitsbehoud zijn de richtlijn overgang van onderneming en diens nationale tegenhangers van toepassing, onder voorwaarde dat ook aan de territoriale en personele werkingssfeer van de richtlijn is voldaan.

Doordat de richtlijn slechts gedeeltelijke en minimum harmonisatie beoogt is deze niet rechtstreeks van toepassing op private partijen in de lidstaten; in plaats daarvan zijn het de nationale overgangsbepalingen die in de praktijk toepassing vergen. Hoofdstuk 2 van dit boek geeft aan dat deze nationale bepalingen op een aantal belangrijke punten verschillen, bijvoorbeeld waar het de definitie van werknemer betreft of het bezwaar van werknemers tegen de overgang van hun arbeidsrelatie, de toepassing van aanvullende pensioenregelingen, de toepassing van rechten en verplichtingen uit collectieve arbeidsovereenkomst of de toepassing van nationale bepalingen op insolvente ondernemingen. Tengevolge van deze verschillen dreigen zich in gevallen betreffende de grensoverschrijdende overgang van onderneming problemen van conflictenrechtelijke aard voor te doen. Het dient daarom duidelijk te (kunnen) worden vastgesteld welk recht van toepassing is op de overgang van onderneming.

Wanneer uit een grensoverschrijdende overgang van onderneming een geschil voortvloeit geeft een dergelijk geschil ongetwijfeld aanleiding tot internationale bevoegdheidsvragen. In zaken betreffende een grensoverschrijdende overgang van onderneming is het van essentieel belang om vast te stellen welke rechter internationaal bevoegd is. Het onderwerp bevoegdheid wordt besproken in hoofdstuk 3 van dit boek. Het doel van dit hoofdstuk is tweeledig: ten eerste wordt ernaar gestreeft om de bestaande Europese regels betreffende bevoegdheid in kaart te brengen en ten tweede wordt beoordeeld of deze regels betreffende bevoegdheid herziening vereisen.

Aangezien de richtlijn overgang van onderneming zelf geen bepalingen betreffende internationale bevoegdheid bezit wordt de bevoegdheid in dit kader, binnen de lidstaten van de Europese Unie, geregeld door de Brussel I-bis Verordening. Deze verordening biedt geen speciale bevoegdheidscategorie voor de overgang van onderneming. In plaats

daarvan worden de vorderingen uit hoofde van een grensoverschrijdende overgang van onderneming ondergebracht bij de bestaande bevoegdheidsartikelen van de verordening. Hoewel de kwalificatie van aan de overgang van onderneming gerelateerde vorderingen gecompliceerd kan blijken, bieden de betreffende artikelen over het algemeen voldoende toegang tot de rechter. Echter, in sommige gevallen wordt door de Brussel I-bis Verordening, in het licht van de proceseconomie en de doelstellingen van de richtlijn overgang van onderneming, geen bevredigend resultaat geboden. Onder de Brussel I-bis Verordening kunnen vorderingen die voortvloeien uit de overgang van een in de Europese Unie gevestigde onderneming buiten het toepassingsbereik van de verordening vallen ondanks het bestaan van een voldoende nauwe band tussen het geschil en de rechter van een Europese lidstaat. In het kader van deze situaties pleit hoofdstuk 3 voor de invoering van een alternatieve bevoegdheidgrond in de richtlijn overgang van onderneming. Deze alternatieve bevoegdheidsgrond, die bevoegdheid verschaft aan de gerechten in de lidstaat van de plaats waar de overgaande onderneming is gevestigd, dient te gelden als een aanvullende bevoegdheidsgrond voor alle vorderingen die rechten en verplichtingen die voortvloeien uit een overgang van onderneming trachten af te dwingen.

Hoofdstuk 4 vormt de kern van dit boek en heeft betrekking op het conflictenrecht. Dit vierde hoofdstuk tracht de regels die het toepasselijke recht op de overgang van onderneming bepalen te beoordelen en te definiëren. Daarbij vindt een kritische evaluatie plaats van de grote verscheidenheid aan meningen en ideeën over de manier waarop het toepasselijk recht in het kader van de overgang van onderneming dient te worden vastgesteld. Een van de belangrijkste bevindingen van dit hoofdstuk is dat de Europese lidstaten op dit punt verschillende conflictenrechtelijke oplossingen hanteren. Daarom wordt gepleit voor de invoering van een nieuwe, uniforme, multilaterale conflictenrechtelijke regeling voor de overgang van onderneming. Bij het vastellen van de juiste conflictenrechtelijke aanknopingsfactor voor deze nieuwe regeling zijn een aansluiting bij de arbeidsovereenkomst en de overnameovereenkomst ten voordele van de locatie van de overgaande onderneming van de hand gewezen. De keuze voor deze laatste aanknopingsfactor is gelegen in het feit dat deze factor het meest natuurlijke aanknopingspunt voor de overgang van onderneming vormt. Aansluiting bij de locatie van de overgaande

onderneming resulteert in de toepassing van een neutrale aanknopingsfactor die nauw verbonden is met de overgaande onderneming als spil van de richtlijn overgang van onderneming. Een extra argument voor toepassing van deze aanknopingsfactor kan gevonden worden in art. 1(2) van de richtlijn overgang van onderneming, welk artikel bewerkstelligt dat de richtlijn van toepassing is 'indien en voorzover de ondernemingen, vestigingen of onderdelen van ondernemingen of vestigingen welke overgaan, *zich* binnen de territoriale werkingssfeer van het Verdrag *bevinden*.' Welbeschouwd bepaalt het hoofdstuk de gewenste methode aan de hand waarvan het toepasselijk recht op de overgang van onderneming dient te worden vastgesteld.

Hoofdstuk 5 betreft de toevoeging van zeeschepen aan het toepassingsbereik van de richtlijn overgang van ondernemning en de effecten van deze toevoeging op het toepasselijk recht. Het belangrijkste doel van hoofdstuk 5 is om te beoordelen of de specifieke kenmerken van de maritieme sector, dat wil zeggen diens inherente grensoverschrijdende en internationale karakteristieken, aanleiding geven tot een bijzondere conflictenrechtelijke behandeling van zeeschepen in het kader van de overgang van onderneming. Wanneer zeeschepen deel uitmaken van een aan land gevestigde onderneming is de voorgestelde conflictenrechtelijke oplossing weinig problematisch. Dit is echter anders waar het gaat om zeeschepen die deel uitmaken van een zeevarende onderneming. Gezien het uiterst mobiele karakter van dit soort ondernemingen is aansluiting bij de locatie van de overgaande onderneming ongewenst. Een dergelijke aansluiting zou misbruik in de hand kunnen werken. Dientengevolge wordt in hoofdstuk 5 een andere aanknopingsfactor voorgesteld voor zeeschepen die deeluitmaken van een mobiele onderneming. Gezien het gemak waarmee schepen kunnen worden uitgevlagd wordt een aanknoping bij de vlaggenstaat afgewezen. In plaats daarvan wordt in hoofdstuk 5 gepleit voor aansluiting bij de staat van waaruit de overgaande onderneming wordt geëxploiteerd en aangestuurd, aangezien deze plaats de enige continue verbinding met een bepaalde staat belichaamt.

Het boek eindigt met een laatste hoofdstuk waarin het gewenste internationaal privaatrechtlijke pad voor de overgang van onderneming beschreven wordt. Daarnaast bevat het hoofdstuk aanbevelingen en

suggesties voor de introductie van bepalingen betreffende het internationaal privaatrecht in de richtlijn overgang van onderneming. Feitelijk biedt het hoofdstuk de laatste, belangrijkste aanbeveling in de vorm van een suggestie voor de invoeging van bepalingen aangaande bevoegdheid en het toepasselijk recht in the richtlijn overgang van onderneming.

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# ANNEX I – Acquired Rights Directive

**Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses**

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 94 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament(1),

Having regard to the opinion of the Economic and Social Committee(2),

Whereas:

(1) Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses(3) has been substantially amended(4). In the interests of clarity and rationality, it should therefore be codified.

(2) Economic trends are bringing in their wake, at both national and Community level, changes in the structure of undertakings, through transfers of undertakings, businesses or parts of undertakings or businesses to other employers as a result of legal transfers or mergers.

(3) It is necessary to provide for the protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded.

(4) Differences still remain in the Member States as regards the extent of the protection of employees in this respect and these differences should be reduced.

(5) The Community Charter of the Fundamental Social Rights of Workers adopted on 9 December 1989 ("Social Charter") states, in points 7, 17 and 18 in particular that: "The completion of the

internal market must lead to an improvement in the living and working conditions of workers in the European Community. The improvement must cover, where necessary, the development of certain aspects of employment regulations such as procedures for collective redundancies and those regarding bankruptcies. Information, consultation and participation for workers must be developed along appropriate lines, taking account of the practice in force in the various Member States. Such information, consultation and participation must be implemented in due time, particularly in connection with restructuring operations in undertakings or in cases of mergers having an impact on the employment of workers".

(6) In 1977 the Council adopted Directive 77/187/EEC to promote the harmonisation of the relevant national laws ensuring the safeguarding of the rights of employees and requiring transferors and transferees to inform and consult employees' representatives in good time.

(7) That Directive was subsequently amended in the light of the impact of the internal market, the legislative tendencies of the Member States with regard to the rescue of undertakings in economic difficulties, the case-law of the Court of Justice of the European Communities, Council Directive 75/129/EEC of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies(5) and the legislation already in force in most Member States.

(8) Considerations of legal security and transparency required that the legal concept of transfer be clarified in the light of the case-law of the Court of Justice. Such clarification has not altered the scope of Directive 77/187/EEC as interpreted by the Court of Justice.

(9) The Social Charter recognises the importance of the fight against all forms of discrimination, especially based on sex, colour, race, opinion and creed.

(10) This Directive should be without prejudice to the time limits set out in Annex I Part B within which the Member States are to comply with Directive 77/187/EEC, and the act amending it,

HAS ADOPTED THIS DIRECTIVE:

## CHAPTER I

## Scope and definitions

### Article 1

1. (a) This Directive shall apply to any transfer of an undertaking, business, or part of an undertaking or business to another employer as a result of a legal transfer or merger.

(b) Subject to subparagraph (a) and the following provisions of this Article, there is a transfer within the meaning of this Directive where there is a transfer of an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.

(c) This Directive shall apply to public and private undertakings engaged in economic activities whether or not they are operating for gain. An administrative reorganisation of public administrative authorities, or the transfer of administrative functions between public administrative authorities, is not a transfer within the meaning of this Directive.

2. This Directive shall apply where and in so far as the undertaking, business or part of the undertaking or business to be transferred is situated within the territorial scope of the Treaty.

3. This Directive shall not apply to seagoing vessels.

### Article 2

1. For the purposes of this Directive:

(a) "transferor" shall mean any natural or legal person who, by reason of a transfer within the meaning of Article 1(1), ceases to be the employer in respect of the undertaking, business or part of the undertaking or business;

(b) "transferee" shall mean any natural or legal person who, by reason of a transfer within the meaning of Article 1(1), becomes the

employer in respect of the undertaking, business or part of the undertaking or business;

(c) "representatives of employees" and related expressions shall mean the representatives of the employees provided for by the laws or practices of the Member States;

(d) "employee" shall mean any person who, in the Member State concerned, is protected as an employee under national employment law.

2. This Directive shall be without prejudice to national law as regards the definition of contract of employment or employment relationship.

However, Member States shall not exclude from the scope of this Directive contracts of employment or employment relationships solely because:

(a) of the number of working hours performed or to be performed,

(b) they are employment relationships governed by a fixed-duration contract of employment within the meaning of Article 1(1) of Council Directive 91/383/EEC of 25 June 1991 supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed-duration employment relationship or a tempory employment relationship(6), or

(c) they are temporary employment relationships within the meaning of Article 1(2) of Directive 91/383/EEC, and the undertaking, business or part of the undertaking or business transferred is, or is part of, the temporary employment business which is the employer.

## CHAPTER II

## Safeguarding of employees' rights

### Article 3

1. The transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer shall, by reason of such transfer, be transferred to the transferee.

Member States may provide that, after the date of transfer, the transferor and the transferee shall be jointly and severally liable in respect of obligations which arose before the date of transfer from a contract of employment or an employment relationship existing on the date of the transfer.

2. Member States may adopt appropriate measures to ensure that the transferor notifies the transferee of all the rights and obligations which will be transferred to the transferee under this Article, so far as those rights and obligations are or ought to have been known to the transferor at the time of the transfer. A failure by the transferor to notify the transferee of any such right or obligation shall not affect the transfer of that right or obligation and the rights of any employees against the transferee and/or transferor in respect of that right or obligation.

3. Following the transfer, the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement, until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement.

Member States may limit the period for observing such terms and conditions with the proviso that it shall not be less than one year.

4. (a) Unless Member States provide otherwise, paragraphs 1 and 3 shall not apply in relation to employees' rights to old-age, invalidity or survivors' benefits under supplementary company or intercompany pension schemes outside the statutory social security schemes in Member States.

(b) Even where they do not provide in accordance with subparagraph (a) that paragraphs 1 and 3 apply in relation to such rights, Member States shall adopt the measures necessary to protect the interests of employees and of persons no longer employed in the transferor's business at the time of the transfer in respect of rights conferring on them immediate or prospective entitlement to old age benefits, including survivors' benefits, under supplementary schemes referred to in subparagraph (a).

**Article 4**

1. The transfer of the undertaking, business or part of the undertaking or business shall not in itself constitute grounds for dismissal by the transferor or the transferee. This provision shall not stand in the way of dismissals that may take place for economic, technical or organisational reasons entailing changes in the workforce.

Member States may provide that the first subparagraph shall not apply to certain specific categories of employees who are not covered by the laws or practice of the Member States in respect of protection against dismissal.

2. If the contract of employment or the employment relationship is terminated because the transfer involves a substantial change in working conditions to the detriment of the employee, the employer shall be regarded as having been responsible for termination of the contract of employment or of the employment relationship.

**Article 5**

1. Unless Member States provide otherwise, Articles 3 and 4 shall not apply to any transfer of an undertaking, business or part of an undertaking or business where the transferor is the subject of bankruptcy proceedings or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor and are under the supervision of a competent public authority (which may be an insolvency practioner authorised by a competent public authority).

2. Where Articles 3 and 4 apply to a transfer during insolvency proceedings which have been opened in relation to a transferor (whether or not those proceedings have been instituted with a view to the liquidation of the assets of the transferor) and provided that such proceedings are under the supervision of a competent public authority (which may be an insolvency practioner determined by national law) a Member State may provide that:

(a) notwithstanding Article 3(1), the transferor's debts arising from any contracts of employment or employment relationships and payable before the transfer or before the opening of the insolvency proceedings shall not be transferred to the transferee, provided that

such proceedings give rise, under the law of that Member State, to protection at least equivalent to that provided for in situations covered by Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer(7), and, or alternatively, that,

(b) the transferee, transferor or person or persons exercising the transferor's functions, on the one hand, and the representatives of the employees on the other hand may agree alterations, in so far as present law or practice permits, to the employees' terms and conditions of employment designed to safeguard employment opportunities by ensuring the survival of the undertaking, business or part of the undertaking or business.

3. A Member State may apply paragraph 20(b) to any transfers where the transferor is in a situation of serious economic crisis, as defined by national law, provided that the situation is declared by a competent public authority and open to judicial supervision, on condition that such provisions already existed in national law on 17 July 1998.

The Commission shall present a report on the effects of this provision before 17 July 2003 and shall submit any appropriate proposals to the Council.

4. Member States shall take appropriate measures with a view to preventing misuse of insolvency proceedings in such a way as to deprive employees of the rights provided for in this Directive.

**Article 6**

1. If the undertaking, business or part of an undertaking or business preserves its autonomy, the status and function of the representatives or of the representation of the employees affected by the transfer shall be preserved on the same terms and subject to the same conditions as existed before the date of the transfer by virtue of law, regulation, administrative provision or agreement, provided that the conditions necessary for the constitution of the employee's representation are fulfilled.

The first subparagraph shall not supply if, under the laws, regulations, administrative provisions or practice in the Member

States, or by agreement with the representatives of the employees, the conditions necessary for the reappointment of the representatives of the employees or for the reconstitution of the representation of the employees are fulfilled.

Where the transferor is the subject of bankruptcy proceedings or any analoguous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor and are under the supervision of a competent public authority (which may be an insolvency practitioner authorised by a competent public authority), Member States may take the necessary measures to ensure that the transferred employees are properly represented until the new election or designation of representatives of the employees.

If the undertaking, business or part of an undertaking or business does not preserve its autonomy, the Member States shall take the necessary measures to ensure that the employees transferred who were represented before the transfer continue to be properly represented during the period necessary for the reconstitution or reappointment of the representation of employees in accordance with national law or practice.

2. If the term of office of the representatives of the employees affected by the transfer expires as a result of the transfer, the representatives shall continue to enjoy the protection provided by the laws, regulations, administrative provisions or practice of the Member States.

## CHAPTER III

## Information and consultation

### Article 7

1. The transferor and transferee shall be required to inform the representatives of their respective employees affected by the transfer of the following:

- the date or proposed date of the transfer,

- the reasons for the transfer,

- the legal, economic and social implications of the transfer for the employees,

- any measures envisaged in relation to the employees.

The transferor must give such information to the representatives of his employees in good time, before the transfer is carried out.

The transferee must give such information to the representatives of his employees in good time, and in any event before his employees are directly affected by the transfer as regards their conditions of work and employment.

2. Where the transferor or the transferee envisages measures in relation to his employees, he shall consult the representatives of this employees in good time on such measures with a view to reaching an agreement.

3. Member States whose laws, regulations or administrative provisions provide that represenatives of the employees may have recourse to an arbitration board to obtain a decision on the measures to be taken in relation to employees may limit the obligations laid down in paragraphs 1 and 2 to cases where the transfer carried out gives rise to a change in the business likely to entail serious disadvantages for a considerable number of the employees.

The information and consultations shall cover at least the measures envisaged in relation to the employees.

The information must be provided and consultations take place in good time before the change in the business as referred to in the first subparagraph is effected.

4. The obligations laid down in this Article shall apply irrespective of whether the decision resulting in the transfer is taken by the employer or an undertaking controlling the employer.

In considering alleged breaches of the information and consultation requirements laid down by this Directive, the argument that such a breach occurred because the information was not provided by an undertaking controlling the employer shall not be accepted as an excuse.

5. Member States may limit the obligations laid down in paragraphs 1, 2 and 3 to undertakings or businesses which, in terms of the

number of employees, meet the conditions for the election or nomination of a collegiate body representing the employees.

6. Member States shall provide that, where there are no representatives of the employees in an undertaking or business through no fault of their own, the employees concerned must be informed in advance of:

- the date or proposed date of the transfer,

- the reason for the transfer,

- the legal, economic and social implications of the transfer for the employees,

- any measures envisaged in relation to the employees.

## CHAPTER IV

## Final provisions

### Article 8

This Directive shall not affect the right of Member States to apply or introduce laws, regulations or administrative provisions which are more favourable to employees or to promote or permit collective agreements or agreements between social partners more favourable to employees.

### Article 9

Member States shall introduce into their national legal systems such measures as are necessary to enable all employees and representatives of employees who consider themselves wronged by failure to comply with the obligations arising from this Directive to pursue their claims by judicial process after possible recourse to other competent authorities.

**Article 10**

The Commission shall submit to the Council an analysis of the effect of the provisions of this Directive before 17 July 2006. It shall propose any amendment which may seem necessary.

**Article 11**

Member States shall communicate to the Commission the texts of the laws, regulations and administrative provisions which they adopt in the field covered by this Directive.

**Article 12**

Directive 77/187/EEC, as amended by the Directive referred to in Annex I, Part A, is repealed, without prejudice to the obligations of the Member States concerning the time limits for implementation set out in Annex I, Part B.

References to the repealed Directive shall be construed as references to this Directive and shall be read in accordance with the correlation table in Annex II.

**Article 13**

This Directive shall enter into force on the 20th day following its publication in the Official Journal of the European Communities.

**Article 14**

This Directive is addressed to the Member States.

Done at Brussels, 12 March 2001.

For the Council

The President

B. Ringholm

(1) Opinion delivered on 25 October 2000 (not yet published in the Official Journal).

(2) OJ C 367, 20.12.2000, p. 21.

(3) OJ L 61, 5.3.1977, p. 26.

(4) See Annex I, Part A.

(5) OJ L 48, 22.2.1975, p. 29. Directive replaced by Directive 98/59/EC (OJ L 225, 12.8.1998, p. 16).

(6) OJ L 206, 29.7.1991, p. 19.

(7) OJ L 283, 20.10.1980, p. 23. Directive as last amended by the 1994 Act of Accession.